90-1401

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANR PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court and the Court of Appeals below erred in ordering petitioner, an interstate natural gas pipeline company, to produce to its adverse party, a gas producer, in "take-or-pay" contract litigation, confidential settlement agreements that petitioner had negotiated with third parties in other "take-or-pay" litigation, and confidential self-critical take-or-pay analyses that petitioner was required by the Federal Energy Regulatory Commission to compile and submit to the Commission.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANR Pipeline Company ("ANR"), petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on October 12, 1990.

ORDERS BELOW

The orders pertinent to this petition are the following:

(1) the orders of the United States District Court for the Southern District of Texas, Houston Division, compelling production of confidential settlement agreements and self-critical analyses (Appendix, pp. 2a, 3a);

(2) the unreported order of the United States Court of Appeals for the Fifth Circuit denying

ANR's petition for a writ of mandamus to the district court (App., p. 1a); and

(3) the unreported order of the Court of Appeals denying ANR's petition for rehearing (App., p. 5a).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied ANR's petition for a writ of mandamus to the United States District Court for the Southern District of Texas, Houston Division, on October 12, 1990. The Court of Appeals denied ANR's petition for rehearing on November 14, 1990. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

In the case below, the United States Court of Appeals for the Fifth Circuit has rendered a decision of national importance to the natural gas industry which is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3470-71 (U.S. Nov. 21, 1990) (No. 90-806). The decision of the Court of Appeals for the Fifth Circuit is also in direct conflict with orders of the federal agency entrusted with regulating the natural gas industry, the Federal Energy Regulatory Commission (the "Commission"). Further, the Court of Appeal's decision determines an important question of federal law not previously addressed by this Court, which this Court should decide.

Since 1985, the Commission has been engaged in a restructuring of the interstate natural gas industry. During this same period of time, countless lawsuits involving billions of dollars have been brought by producers of natural gas against interstate natural gas pipeline companies for alleged breaches of so-called "take-or-pay" provisions in gas purchase contracts between such producers and pipelines.[2] The success of the Commission's restructuring of the industry has depended to a large extent upon the voluntary resolution of take-or-pay claims between producers and pipelines. *See generally American Gas Ass'n*, 912 F.2d at 1503-08; "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500-H, 54 Fed. Reg. 52,344, 52,359 (Dec. 21, 1989).

The voluntary resolution of take-or-pay disputes continues to be essential to the Commission's restructuring of the industry. A sizeable number of lawsuits, involving billions of dollars in potential take-or-pay liability, remain pending. The issues raised by this petition—the discoverability of confidential settlement agreements and confidential self-critical take-or-pay analyses that have been filed with the Commission as part of its Order 500 proceeding and in ratemaking proceedings—will critically

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2. Under the typical take-or-pay clause, the buyer, or pipeline company, must, subject to all other terms of the contract and applicable law, "take or, if not take, pay for, a minimum amount of gas" from the well or wells covered by the contract, on a daily, monthly, or annual basis. *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1150-51 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986). This Court recently noted the "significant dislocations" attributable to take-or-pay contracts. *Mobil Oil Exploration & Producing Southeast, Inc. v United Distribution Cos.*, 111 S. Ct. 615, 627 (1991).

affect these lawsuits, as well as the ongoing settlement negotiations in the industry. The course those settlement negotiations take, in turn, is of vital importance to natural gas consumers in this nation, as costlier settlements—the certain product of the rulings below—will mean higher prices for natural gas at the burner tip for many years to come.

A. Documents Involved

In 1987, the Commission, to assess the scope of the take-or-pay problem, required forty-five interstate pipelines, including ANR, to submit information to the Commission regarding the pipeline's take-or-pay situation. *See* "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500, 52 Fed. Reg. 30,334, 30,341 (Aug. 14, 1987). As part of their response to the Commission's "Take-or-Pay Data Request," pipelines were required to report details of settlement agreements resolving take-or-pay claims. The Commission, while releasing its compilation of the responses in aggregate form, has refused to release pipelines' individual responses. *See* "Regulation of Natural Gas After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500-H, 54 Fed. Reg. 52,344, 52,348-49 (Dec. 21, 1989) (releasing compilation of data in aggregate form only); "Regulation of Natural Gas Pipeline After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-059], Order Denying Release of Data (March 21, 1990) (denying trade associations' attempt to obtain settlement information) (App., p. 49a).

The Commission has also required pipelines to furnish copies of settlement agreements negotiated with producers as part of rate proceedings involving the recovery of take-or-pay costs. With respect to ANR's settlement agreements, the Commission has approved protective orders governing the dissemination of the terms of those agreements. "Protective Order" [Federal Energy Regulatory Commission Docket No. RP89-45-000] (Jan. 30, 1989) (App., p. 65a). The orders limit the persons who may obtain access to the information to (1) sales or transportation customers of ANR, (2) state regulatory agencies, and (3) Commission staff. App., p. 66a. The orders expressly provide that "a reviewing party may not be a producer." *Id.*

B. Procedural Background

In this case, Exxon Corporation ("Exxon"), a producer of natural gas, alleges take-or-pay claims against ANR under three gas purchase contracts between the parties covering properties in Wyoming, Texas, and Oklahoma. In a discovery request, Exxon requested that ANR produce for Exxon's inspection documents submitted by ANR to the Commission which "relate in any way to take-or-pay, including any response to the FERC 500 Take-or-Pay Data Request in Docket No. RM87-34-000." App., p. 7a. ANR produced all non-confidential documents requested, but ANR objected to producing documents that had been filed with the Commission that contained confidential information. App., pp. 10a-11a. The documents withheld consisted of (1) settlement agreements ANR had negotiated with other producers in other take-or-pay litigation, which the Commission required ANR to submit in ratemaking proceed-

ings; and (2) the confidential self-critical analyses that the Commission had required ANR to perform and to submit in response to the Take-or-Pay Data Request, which also contained detailed information concerning ANR's settlements of take-or-pay claims.

Exxon moved to compel production of the confidential information. App., p. 12a. Without any hearing, by an order dated June 15, 1990, the district court granted Exxon's motion to compel.[3] App., p. 2a. ANR moved for reconsideration of the court's order or, alternatively, for the court to certify the question for immediate appeal. App., p. 20a. The court denied ANR's motion in an order of September 11, 1990. App., p. 3a. ANR petitioned the United States Court of Appeals for the Fifth Circuit for a writ of mandamus. App., p. 27a. On October 12, 1990, without hearing oral argument, the Court of Appeals for the Fifth Circuit denied ANR's petition for a writ of mandamus. App., p. 1a. ANR petitioned for rehearing on October 26, 1990. App., p. 43a. ANR's petition for rehearing was denied by the Court of Appeals, without oral argument, on November 14, 1990. App., p. 5a.

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3. The United States District Court for the Southern District of Texas had jurisdiction over this case under 28 U.S.C. § 1332(a).

REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Court Below Compelling Production Of Confidential Take-or-Pay Settlement Information Conflicts With A Decision Of The United States District Court For The District Of Columbia Circuit, And With Orders Of The Federal Energy Regulatory Commission.

The decision of the United States Court of Appeals for the Fifth Circuit refusing to vacate the district court's order compelling production of confidential settlement information is in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *petition for cert. filed*, 59 U.S. L.W. 3470-71 (U.S. Nov. 21, 1990) (No. 90-806), is in conflict with Commission orders, and determines an important issue of federal law, not previously addressed by this Court, which has far-reaching consequences for the natural gas industry and for the natural gas consumer in this country.

The district court's order compelling ANR to produce documents reflecting details of confidential take-or-pay settlement agreements to a natural gas producer in civil litigation intrudes upon and jeopardizes the delicate process involved in achieving uncoerced, voluntary settlements of take-or-pay disputes. The voluntary settlement of take-or-pay claims between pipelines and producers is the linchpin of the Commission's restructuring of the natural gas industry. In Order No. 500-H, the Commission found as follows:

> The Commission will not take action under NGA [Natural Gas Act] section 5 to modify producer-pipeline take-or-pay contracts, *since pipelines are able to resolve their take-or-pay problems through settlements. Resolution through settlements is more compatible with Congress' decision to rely on competitive markets and provides a more complete resolution than is possible under section 5*, under which the Commission cannot modify take-or-pay provisions covering nonjurisdictional gas.

"Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500-H Fed. Reg. 52,344, 52,358 (Dec. 21, 1989) (emphasis added).

Essential to the viability of settlement negotiations as an alternative to litigation for resolving take-or-pay claims is that there be substantially equal bargaining power between the parties. *See* "Regulation of Natural Gas Pipeline After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-058], Order No. 500-I, 55 Fed. Reg. 6,605, 6,607-09 (Feb. 12, 1990).[4] Disclosure of the terms of settlements will severely weaken pipelines' bargaining position in take-or-pay negotiations. Disclosure encourages one's adversary not to settle for any terms less favorable than the most onerous terms previously conceded. Essentially, disclosure establishes a "floor" for future negotiations. The predictable result is that the price of settlement will increase dramatically as each new settlement becomes

4. The Court of Appeals for the District of Columbia has noted the importance of renegotiation of take-or-pay contracts to the Commission's restructuring of the industry. *See Associated Gas Dist. v. FERC*, 824 F.2d 981, 1027-30, 1044 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

the floor from which bargaining begins on the next settlement.

Producer groups, in remarks to the Commission when the "shoe was on the other foot," have recognized these consequences of disclosure:

> Nothing is more confidential for a business entity than its bottom-line negotiation position. Current take-or-pay settlement negotiations between producers and pipelines are among the most complex, difficult, high-stakes negotiations this industry has ever seen. *Public disclosure of precisely what a producer is willing to accept, or a pipeline is willing to give up, would be tremendously destructive to this ongoing process.*
>
> . . . . *[E]ach party to a particular settlement is bound to have numerous other negotiations still underway. Negotiating when the other side has seen your hole card is an exercise in futility.*
>
> . . . . Another . . . result will be that costs of settlements will increase as *each new disclosure of a particular settlement agreement becomes the floor-bargaining position for the next negotiation.*

"Joint Comments of Indicated Producers" [Federal Energy Regulatory Commission Docket No. RM87-34-000] (Oct. 13, 1987) (App., p. 77a) (emphasis added).

The Commission, in ruling that individual settlement agreements were not to be disclosed, has held:

> There is no doubt that these data and materials submitted by the pipelines are sensitive commercial information. *Disclosure will . . . cause the pipeline substantial competive harm in that producers will know the terms of settlements that have already been executed.*

"Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-059], Order Denying Release of Data (March 21, 1990) (App., p. 61a) (emphasis added).

The increased cost of settlement will ultimately be borne by the consumers of natural gas in this country. This will be the result because interstate pipeline companies are entitled to pass through in their rates a portion of the cost incurred in settling take-or-pay claims. *See* "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500, 52 Fed. Reg. 30,334 (Aug. 14, 1987). This harm to consumers is a principal reason that the Commission has steadfastly refused to disclose the terms of take-or-pay settlement agreements to producers. As the Commission has stated: "[D]isclosure will harm pipeline ratepayers and consumers because a lessening of the pipeline's bargaining power would result in less favorable settlements for the pipelines and the flowthrough of the attendant higher settlement costs to ratepayers and to consumers." "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-059], Order Denying Release of Data (March 21, 1990) (App. p. 61a).

The Commission's rationale was followed by the Court of Appeals for the District of Columbia Circuit in upholding the Commission's decision not to release data regarding take-or-pay settlements in *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3470-71 (U.S. Nov. 21, 1990) (No. 90-806). In *American Gas Association*,

the Court of Appeals for the District of Columbia Circuit upheld "the Commission's decision not to release the raw data about individual settlements it compiled . . . ." 912 F.2d at 1508-09 n.3. In upholding that decision, the Court of Appeals recognized "Congress's strong preference for reliance on private agreements for structuring the wellhead market," *id.* at 1508, and expressly noted that the Commission's decision was based on "parties' expressions of concern about the competitive effect of release." *Id.* at 1508-09 n.3.[5]

The United States Court of Appeals for the Fifth Circuit, in failing to vacate the district court's order, has rendered a decision in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Gas Association*. Moreover, the Court of Appeals' decision, if allowed to stand, will severely hamper the industry's ongoing efforts to overcome the "significant dislocations" in the industry that have been attributed to take-or-pay contracts. The United States Supreme Court should grant this petition to resolve

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5. Aside from these important national policy considerations, precedent supports not permitting discovery into the terms of settlement agreements between a litigant and others not parties to the suit. *See, e.g., Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (litigant not entitled to "discovery into the terms of [a settlement] agreement . . . based solely on the hope that it will somehow lead to admissible evidence . . ."; to hold otherwise would undermine "the strong public policy of favoring settlements and the congressional intent [underlying the Federal Rules of Evidence and the Federal Rules of Civil Procedure] to further that policy by insulating the bargaining table from unnecessary intrusion . . ."); *City of Groton v. Connecticut Light & Power Co.*, 84 F.R.D. 420, 423 (D. Conn. 1979), *aff'd*, 802 F.2d 443 (2d Cir. 1986) (litigant not entitled to discovery of a third-party settlement agreement where that settlement agreement was susceptible to use by the litigant as a "floor" for its own settlement bargaining with the opposing party).

the conflict between the decision by the Court of Appeals for the Fifth Circuit in this case and the decision by the Court of Appeals for the District of Columbia Circuit in *American Gas Association*.

II.

The Court Below, In Compelling Production Of Self-Critical Take-or-Pay Analyses, Has Decided An Important Question Of Federal Law, Not Previously Addressed By This Court, And Has Ignored Existing Law Exempting This Material From Discovery.

In 1987, the United States Court of Appeals for the District of Columbia Circuit ordered the Commission to analyze and determine whether to invoke its power under the Natural Gas Act to modify or to set aside jurisdictional contracts with troublesome take-or-pay provisions as a part of the Commission's general restructuring of the natural gas industry. *See Associated Gas Dist. v. FERC*, 824 F.2d 981, 1027-30, 1044 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). A result of the Court of Appeals' mandate was the Commission's initiation of its Order 500 proceeding. In a notice of interim rule and statement of policy in that proceeding, the Commission notified all pipelines:

> In order to make this reassessment, the [Commission] needs more information to analyze fully how effective and appropriate action under section 5 [of the NGA] would be in mitigating pipeline take-or-pay problems. To this end, the [Commission] intends to exercise its authority under NGA sections 10 and 14 and NGPA [Natural Gas Policy Act] sections

> 501 and 508 to send to each interstate natural gas pipeline company a data request to determine the extent and nature of the pipelines' take-or-pay obligations with respect to the various NGPA pricing categories.

"Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500, 52 Fed. Reg. 30,334, 30,341 (Aug. 14, 1987); *see Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 111 S. Ct. 615, 627 (1991) (Commission properly initiated separate proceedings to "compile relevant data" in its asssessment of the take-or-pay situation).

In its request, the Commission required forty-five pipelines, including ANR, to perform numerous calculations respecting their gross take-or-pay "obligation," and to estimate their potential take-or-pay "exposure." The Take-or-Pay Data Request prescribed a methodology and a format for pipelines to follow. That mandated methodology and format did not comprehend affirmative legal defenses and contractual adjustments to a pipeline's take-or-pay obligation.

In its notice regarding its Take-or-Pay Data Request, the Commission warned that "[p]ipelines failing to respond will be subject to civil penalties under NGPA Section 504(b)." 52 Fed. Reg. at 30,341. However, the Commission assured the pipelines that they could request confidential treatment of their responses pursuant to a provision of the Code of Federal Regulations. *Id.*[6]

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6. Section 388.112 of the Commission's rules and regulations provides that "[a]ny person submitting a document to the Commission may request privileged treatment . . . ." 18 C.F.R. § 388.112 (1990).

ANR requested confidential treatment of its response. App., p. 48a.

Two privileges recognized by the federal courts support nondisclosure of the response. First, the response is privileged from discovery under the "confidential reports" privilege. *See Association For Women In Science v. Califano*, 566 F.2d 339, 343-44 (D.C. Cir. 1977). This privilege protects confidential reports submitted to government entities from discovery when the confidentiality is statutorily based. *Id.* at 344. In applying the privilege, a court must balance "the need of litigants for information possessed by the Government and the need of the Government to foster the flow of information provided to it." *Id.* at 346 (quoting *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 769 (D.C. Cir. 1965)).

A corollary privilege to the confidential reports privilege is the "self-critical analysis" privilege, also applicable here. This privilege applies to mandatory special reports to governmental agencies which contain self-critical analyses. *See, e.g., Hoffman v. United Telecommunications, Inc.*, 117 F.R.D. 440 (D. Kan. 1987) (evaluative portions of affirmative action filings protected from discovery); *Roberts v. Carrier Corp.*, 107 F.R.D. 678 (N.D. Ind. 1985) (self-critical portion of product information submitted to the Consumer Product Safety Commission protected from discovery). This self-critical analysis privilege is described in *Webb v. Westinghouse Electric Corp.*, 81 F.R.D. 431 (E.D. Pa. 1978):

> *First*, materials protected have generally been those prepared for mandatory governmental reports.

> *Second*, only subjective, evaluative materials have been protected . . . .
>
> *Finally*, courts have been sensitive to the need of the plaintiffs for such materials, and denied discovery only where the policy favoring exclusion of the materials clearly outweighed plaintiff's need.

Id. at 434. The policy behind the privilege "recognizes that voluntary compliance by [businesses] with federal . . . laws is essential" for the laws' implementation. *Id.* at 433. The privilege encourages those subject to governmental requests for information to be "candid and forthright" in responding. *Id.* Any disclosure of the information through discovery would have a "chilling effect" on voluntary compliance with government's requests for information and self-critical studies. *Id.*

ANR's response to the Commission's Take-or-Pay Data Request falls squarely within the confidential reports and self-critical analysis privileges. ANR's response was prepared and submitted in response to a mandate of a governmental agency. The Commission directive ordering preparation of the response stated: "Pipelines failing to respond will be subject to civil penalties . . . ." 52 Fed. Reg. at 30,341.

The response is protected from disclosure by regulation. Section 388.112 of the Commission's rules and regulations, which have the force of statute, provide that "[a]ny person submitting a document to the Commission may request privileged treatment by claiming some or all of the information contained in a particular document is exempt from the mandatory public disclosure of the Freedom of Information Act, 5 U.S.C. § 522, and should otherwise be withheld from public disclosure." 18 C.F.R.

§ 388.112 (1990). The Commission, in its Take-or-Pay Data Request, invited responding pipelines to request such confidential treatment. 52 Fed. Reg. at 30,341. ANR requested that its response be kept confidential. App., p. 48a. The Commission has kept the response confidential, observing that the response contains sensitive commercial information that, if disclosed, would "cause the pipeline substantial competitive harm in that producers [would] know the terms of settlements that have already been executed." "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-059], Order Denying Release of Data (March 21, 1990) (App., p. 61a).

The information provided by ANR was "subjective, evaluative material." Exxon, in its own response to the Take-or-Pay Data Request, expressed its "concern" that the Commission's format was entirely subjective. Exxon observed: "Exxon is concerned that the accuracy of the Commission's data base is dependent upon the *subjective interpretation of the contracts and data request*." "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Response of Exxon Corporation to Take-or-Pay Data Request (Nov. 2, 1987) (App., p. 91a) (emphasis added).

Finally, the policy favoring protecting confidential reports and self-critical analyses from disclosure outweighs any use Exxon may have for the information. As has been noted in other take-or-pay litigation, the "cash amounts of [take-or-pay settlement agreements] might be of interest . . . as a comparative bargaining tool for . . .

settlement purpose[s], but such an interest does not . . . satisfy the relevancy test for discovery." *Palo Duro Pipeline Co. v. Cochran*, 785 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1990, no writ).

Both the confidential reports privilege and the self-critical analysis privilege protect pipelines' responses to the Take-or-Pay Data Request from discovery. In the broader context, moreover, if discovery of pipelines' responses to the Commission's Take-or-Pay Request is allowed, the cost of take-or-pay settlements will increase, triggering, as pipelines pass through a portion of the cost of these settlements, an increase in the cost of gas for American consumers. Whether these responses should be discoverable is an important question of federal law, not previously decided by this Court, that has been wrongly decided by the courts below. The only means to prevent the unfavorable results of the lower courts' decisions is to establish a precedent that such information is not discoverable by producers in take-or-pay litigation against pipelines.

CONCLUSION

The issues presented by this petition for a writ of certiorari are of vital importance to the Commission's restructuring of the natural gas industry, to the ongoing settlement negotiations between interstate pipelines companies and producers of natural gas, and to natural gas consumers. Permitting the orders of the courts below to stand will result in costlier settlements and, consequently, an increase in the cost of natural gas at the burner tip. The decision by the Court of Appeals for the Fifth Circuit is in direct conflict with the decision

by the Court of Appeals for the District of Columbia Circuit in *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *petition for cert. filed*, 59 U.S. L.W. 3470-71 (U.S. Nov. 21, 1990) (No. 90-806). ANR Pipeline Company respectfully asks that the Court grant this petition for a writ of certiorari to review the orders of the courts below, to settle these important issues of federal law, and to rule that the details of confidential settlement agreements covering take-or-pay claims that pipelines have negotiated with producers of natural gas, and the self-critical analyses that pipelines have been required to perform and to submit to the Commission, are not discoverable in civil litigation between pipelines and producers of natural gas.

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-2864
(D.C. NO. CA-H-89-1011)

IN RE: ANR PIPELINE COMPANY,
Petitioner.

(Filed October 12, 1990)

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1011

EXXON CORPORATION,
Plaintiff,

v.

ANR PIPELINE COMPANY AND
ANR SUPPLY COMPANY,
Defendants.

(Filed June 15, 1990)

ORDER

Came on this day plaintiff Exxon Corporation's motion to compel production of documents (document #19) from ANR Pipeline Company and the Court having considered same is of the opinion that said motion is meritorous and should be granted. Accordingly,

It is ORDERED that the plaintiff's motion to compel production of documents is GRANTED. The defendant shall have 30 days to complete the process unless agreed otherwise. No cost or attorney's fees are awarded at this time.

SIGNED this 14th day of June, 1990.

/s/ KENNETH M. HOYT
Kenneth M. Hoyt
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1011

EXXON CORPORATION,
Plaintiff,

v.

ANR PIPELINE COMPANY AND
ANR SUPPLY COMPANY,
Defendants.

(Filed September 11, 1990)

ORDER OF CLARIFICATION

Came on this day plaintiff's Motion for Clarification of this Court's order of June 15, 1990.

It is ORDERED that the plaintiff's Motion for Clarification is GRANTED.

It is further ORDERED that any reference to (document #19) contained in this Court's order of June 15, 1990, refers to the place in which the Motion to Compel appears in the Court's file.

It is further ORDERED that ANR Pipeline Company hereby produce in accordance with this Court's order of June 15, 1990 all documents requested in Exxon's Motion to Compel.

It is further ORDERED that ANR Pipeline Company's Motion for Protective Order is hereby DENIED.

It is further ORDERED that ANR Pipeline Company's motion for reconsideration, or, in the alternative certification of order compelling discovery is hereby DENIED.

SIGNED this 5th day of September, 1990.

/s/ KENNETH M. HOYT
Kenneth M. Hoyt
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 90-2864

IN RE: ANR PIPELINE COMPANY,
Petitioner.

(Filed November 14, 1990)

Appeal from the United States District Court for the Southern District of Texas

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

IT IS ORDERED that the petition for rehearing of ANR Pipeline Company is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-89-1011

EXXON CORPORATION,
Plaintiff,

v.

ANR PIPELINE COMPANY AND
ANR SUPPLY COMPANY,
Defendants.

PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION, AND REQUEST FOR PRODUCTION OF DOCUMENTS PROPOUNDED TO DEFENDANT ANR PIPELINE COMPANY

TO: ANR Pipeline Company, by and through its attorney of record, B. Thomas Cook, Bracewell & Patterson, 2900 South Tower Pennzoil Place, Houston, Texas 77002.

Plaintiff Exxon Corporation propounds the following written interrogatories and requests for admission to defendant ANR Pipeline Company ("ANR"), pursuant to Rules 33 and 36 of the Federal Rules of Civil Procedure. These interrogatories are to be answered separately and fully in writing and under oath by defendant, and the answers are to be served upon the undersigned counsel for Exxon on or before August 16, 1989. These interrogatories shall be deemed continuing to the full extent allowed by the Federal Rules of Civil Procedure, including Rule 26(e).

Pursuant to the provisions of Rule 34 of the Federal Rules of Civil Procedure, defendant is further requested to produce and make available for inspection and copying by Exxon all documents and tangible things described below at the location where they are kept in the ordinary course of business or at an agreed location, on or before August 16, 1989.

With respect to the production of documents you are instructed that Rule 34, Federal Rules of Civil Procedure requires a party to produce documents "as they are kept in the usual course of business or . . . organize[d] and label[led] . . . to correspond with the categories in the request." . . .

. . . .

DOCUMENT REQUEST NO. 5:

Please produce the following documents submitted by ANR from January 1983 to the Federal Energy Regulatory Commission: (a) FERC Form No. 2, "Annual Report of Natural Gas Companies" (b) FERC Form No. 15, "Interstate Pipeline's Annual Report of Gas Supply"; (c) FERC Form No. 11, "Natural Gas Pipeline Company Monthly Statement"; (d) FERC Form No. 16, "Report of Gas Supply and Requirements"; (e) all purchased gas filings made with the Commission; (f) all filings made by you with the Commission which relate in any way to (i) minimum bills, (ii) take-or-pay, including any response to FERC 500 take or pay data request in Docket No. RM87-34-000, or (iii) deliveries of gas ratably by NGPA price categories; (g) all filings seeking changes in rates, terms and conditions of service with respect to sales rate schedules applicable to sales customers in Wisconsin, Michigan and Illinois, including rate Sched-

ules MC-1 and CD-1; (h) all offers of settlement filed with the FERC by ANR; (i) all orders issued by the Commission in response to any of the above-referenced filings.

. . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-89-1011
(Jury Demanded)

EXXON CORPORATION,
Plaintiff,

v.

ANR PIPELINE COMPANY and
ANR SUPPLY COMPANY,
Defendants.

DEFENDANT ANR PIPELINE COMPANY'S ANSWERS, OBJECTIONS, AND RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

TO: Exxon Corporation, by and through its attorneys of record, Shannon H. Ratliff, McGinnis, Lochridge & Kilgore, 1300 Capitol Center, 919 Congress Avenue, Austin, Texas 78701.

Pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, Defendant ANR Pipeline Company

("ANR") serves on Plaintiff Exxon Corporation ("Exxon") the following Answers and/or Objections to Plaintiff's First Set of Interrogatories and Responses to Plaintiff's Requests for Production of Documents.

. . . .

DOCUMENT REQUEST NO. 5:

Please produce the following documents submitted by ANR from January 1983 to the Federal Energy Regulatory Commission: (a) FERC Form No. 2, "Annual Report of Natural Gas Companies" (b) FERC Form No. 15, "Interstate Pipeline's Annual Report of Gas Supply"; (c) FERC Form No. 11, "Natural Gas Pipeline Company Monthly Statement"; (d) FERC Form No. 16, "Report of Gas Supply and Requirements"; (e) all purchased gas adjustments filings made with the Commission; (f) all filings made by you with the Commission which relate in any way to (i) minimum bills, (ii) take-or-pay, including any response to FERC 500 take or pay data request in Docket No. RM87-34-000, or (iii) deliveries of gas ratably by NGPA price categories; (g) all filings seeking changes in rates, terms and conditions of service with respect to sales rate schedules applicable to sales customers in Wisconsin, Michigan and Illinois, including rate Schedules MC-1 and CD-1; (h) all offers of settlement filed with the FERC by ANR; (i) all orders issued by the Commission in response to any of the above referenced filings.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

ANR will make the non-privileged documents in ANR's possession that are responsive to Request Nos. 5(a)-(e),

5(f)(i), and 5(g) available for inspection and copying by attorneys for Plaintiff at a mutually agreeable time at ANR's offices in Detroit, Michigan and/or Houston, Texas. Responding to Request No. 5(f)(ii), ANR objects to the production of any documents submitted to the Federal Energy Regulatory Commission, or any other federal or state agency, body, or organization, and designated by ANR as confidential and treated as confidential by the Federal Energy Regulatory Commission, or other governmental agency, body, or organization. Responding to Request No. 5(h), ANR objects on the following grounds: (i) such information is not relevant to the subject matter in the pending action or reasonably calculated to lead to the discovery of admissible evidence; (ii) the request for "all" offers is overbroad and burdensome; and (iii) the documents sought relate to the negotiation and settlement of various matters pending before the FERC which are treated by the FERC and the parties to the proceedings as privileged and confidential. ANR is currently unable to respond to Request No. 5(f)(iii) because ANR does not understand this Request; ANR solicits Exxon's explanation regarding the documents it is seeking. The orders requested in Document Request No. 5(i) are as readily available to the Plaintiff as to ANR. In the spirit of accommodation, ANR will make the documents in ANR's possession that are responsive to Request No. 5 (i) available for inspection and copying by attorneys for Plaintiff at a mutually agreeable time at ANR's offices in Detroit, Michigan and/or Houston, Texas.

. . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1011

EXXON CORPORATION,
Plaintiff,

v.

ANR PIPELINE COMPANY AND
ANR SUPPLY COMPANY,
Defendants.

PLAINTIFF EXXON CORPORATION'S MOTION TO COMPEL

Exxon Corporation ("Exxon") files this Motion to Compel the production of documents from ANR Pipeline Company ("ANR") pursuant to Rule 37 of the Federal Rules of Civil Procedure and in support thereof shows the following:

I.

On or about July 14, 1989 Exxon served its First Set of Interrogatories, Requests for Admission, and Request for Production of Documents on ANR in accordance with Rules 33, 34, and 36 of the Federal Rules of Civil Procedure. A copy of this document is attached as *Exhibit "A"*. The request that is the subject of this Motion to Compel reads in part as follows:

> *DOCUMENT REQUEST NO. 5:* Please produce the following documents submitted by ANR from January 1983 to the Federal Energy Regulatory Com-

> mission: . . . (f) all filings made by you with the Commission which relate in any way to . . . (ii) take-or-pay, including any response to FERC 500 take or pay data request in Docket No. RM87-34-000 . . . .

In responding to Document Request No. 5, ANR objected to the production of any documents submitted to the Federal Energy Regulatory Commission, or any other federal or state agency, body, or organization, and designated by ANR as confidential and treated as confidential by the Federal Energy Regulatory Commission, or other governmental agency, body, or organization. A copy of ANR's response to Exxon's Request for Production is attached as *Exhibit "B"*. ANR continues to refuse to produce the documents responsive to Request No. 5(f)(ii).

II.

In this lawsuit, Exxon has sued ANR for breach of the take-or-pay provisions of certain gas purchase contracts between them. ANR has denied any liability for its failure to perform under the contracts based in part on its assertion that its performance was excused by certain federal regulations. The information Exxon seeks goes to the heart of this defensive issue as well as to Exxon's affirmative claims against ANR.[1]

---

1. Based on its experience in other such cases, Exxon believes that the information which ANR seeks to shield from discovery in this proceeding will show that ANR had reported to the FERC that it owes take-or-pay deficiencies to its producers under the terms of gas purchase contracts with other producers similar to ANR's contracts with Exxon, notwithstanding the governmental regulation force majeure defense it alleges in this suit and has alleged in other such suits. Thus, the information sought is relevant to this lawsuit.

III.

As part of its response to the court's remand in *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1468-1469 (1988), the Federal Energy Regulatory Commission (the "FERC") required that 45 interstate pipeline companies, including ANR, file take-or-pay information on a contract-by-contract basis in the docket involving FERC Order No. 500 (RM87-34-000). The pipelines were required to file detailed information regarding contract take-or-pay provisions, contract pricing provisions, take-or-pay history, take-or-pay obligations, prepayments and settlements, and contract reformations and terminations. All data was required to be submitted on a 9-track magnetic computer tape, a copy of which was to be retained by the pipeline. A true and correct copy of the FERC's initial request to the pipeline companies for take-or-pay data is attached hereto as *Exhibit "C"*.

ANR requested that its take-or-pay data responses not be subject to disclosure under the Freedom of Information Act ("FOIA") pursuant to 18 CFR. § 388.11 2(1988). That section provides in pertinent part as follows:

> (a) *Scope.* Any person submitting a document to the Commission may request privileged treatment by claiming that some or all of the information contained in a particular document *is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, and should otherwise be withheld from public disclosure.*
>
> * * *
>
> (c) Effect of privilege claim—(1) For documents filed with the Commission. (i) The Secretary of the

> Commission will place documents for which privileged treatment is sought in accordance with paragraph (b)(2) of this section in a nonpublic file, while the request for confidential treatment is pending. *By placing documents in a nonpublic file, the Commission is not making a determination on any claim for privilege. The Commission retains the right to make determinations with regard to any claims of privilege, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.* (Emphasis added).

ANR's refusal to produce the documents requested is based on the false assumption that the exemption provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, also set limits on the discovery procedures of the Federal Rules of Civil Procedure ("FRCP"). But exemption under the FOIA does not demonstrate or create a privilege for purposes of discovery under the FRCP. *Pleasant Hill Bank v. United States*, 58 F.R.D. 97 (W.D. Mo. 1973). In *Pleasant Hill*, the defendant argued that certain documents filed with the Department of Housing and Urban Development (the "HUD") were privileged for purposes of civil discovery merely because the documents were protected from public disclosure by the FOIA. In rejecting the defendant's argument, the court stated:

> Defendant's bald assertion that several of the HUD documents are exempt from disclosure under the [FOIA], and thus privileged, is a classic instance of "bootstrapping" and is utterly meaningless for our purposes without an independent showing of privilege.

Id. at 100. The court also cited Congress' intent that the rules of civil procedure be unaffected by the FOIA as

being clearly opposite to the defendant's contention. *Id.* The court concluded:

> Since defendant relies only upon an assertion of exemption under the [FOIA], in the mistaken belief that exemption is equivalent to privilege, and since the HUD documents do not bespeak privilege on their face, we are not now in a position to honor the claim of privilege.

Id. at 101. *See also Kerr v. United States Dist. Ct.*, 511 F.2d 192, 197-198 (9th Cir. 1975) (exceptions to disclosure in the FOIA were not intended to create evidentiary privileges for civil discovery, but were intended to permit withholding of certain types of information from the general public), *aff'd on other grounds*, 426 U.S. 394 (1976).

Additionally, in *In Re Four Seasons Securities Law Litigation*, 54 F.R.D. 527 (W.D. Okla. 1972), plaintiffs sought to discover copies of transcripts of testimony which the defendants had given before the Securities and Exchange Commission ("SEC") in a private investigation, exhibits to such testimony, and other documents given to the SEC. Defendants objected to the production of such documents because they were furnished in confidential nonpublic hearings. Although the documents in *Four Seasons* were exempt from disclosure under the FOIA as "matters that are . . . investigatory files compiled for law enforcement purposes," the court held that the documents were discoverable in civil litigation under the FRCP. *Id.* at 531.

The documents sought from ANR are not protected by any privilege or exemption. No federal rule, regulation or

statute makes the information privileged for purposes of civil discovery. Section 388.112 simply prevents the general public from obtaining such information from the FERC and does not allow ANR, by its unilateral request for confidential treatment, to thereby create a privilege exempting such information from discovery in a lawsuit.

IV.

Exxon has previously faced opposition from two pipeline companies to similar requests for production relating to FERC 500 take-or-pay data in a take-or-pay lawsuit. In *Exxon Corporation v. El Paso Natural Gas Company*, No. MO-88-CA-130, filed in Judge Lucius Bunton's Court in the Western District, Midland Division, El Paso objected to producing its FERC 500 data filings for reasons similar to those stated by ANR here. However, Exxon's Motion to Compel Discovery in that case was granted and El Paso was ordered to produce the data to Exxon. *See Exhibit "D"* attached hereto.

In *Exxon Corporation v. Transwestern Pipeline Company*, No. 89-011331, filed in Judge Sharolyn Wood's court in Harris County, Texas, 127th Judicial District, Transwestern similarly objected to producing its response to the FERC 500 take-or-pay data request. Upon the court's order that Transwestern produce such response, Transwestern filed a petition for leave to file writ of mandamus, seeking to modify the court's order. The Fourteenth Court of Appeals denied Transwestern's motion, thereby leaving in place Judge Wood's order that FERC 500 take-or-pay data submitted by ANR to the FERC is not privileged and is discoverable. *See Exhibit "E"* attached hereto.

WHEREFORE, PREMISES CONSIDERED, Exxon requests the Court to grant Exxon's Motion to Compel and enter an Order:

(a) compelling ANR to produce for Exxon's inspection all documents submitted by ANR to the FERC from January 1983 which relate in any way to take-or-pay, including any response to the FERC 500 Take-or-Pay Data Request in Docket No. RM87-34-000;

(b) requiring ANR to pay Exxon reasonable expenses incurred in obtaining the Order, including reasonable attorney's fees; and

(c) granting such other relief to which Exxon may be entitled.

Respectfully submitted,

/s/ SHANNON H. RATLIFF
Shannon H. Ratliff
Federal ID No. 8011
Attorney-in-Charge
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982
ATTORNEYS FOR PLAINTIFF

Of Counsel:
McGINNIS, LOCHRIDGE & KILGORE
S. Jack Balagia
Arvind J. Sudarshan
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982

CERTIFICATE OF CONFERENCE

I hereby certify that counsel have conferred on the substance of the relief sought in this motion and have been unable to reach an agreement on disposition of this motion pursuant to Local Rule 6A(4).

/s/ SHANNON H. RATLIFF
Shannon H. Ratliff

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the above and foregoing pleading has been mailed, certified mail, return receipt requested, to B. Thomas Cook, Bracewell & Patterson, at 2900 South Tower Pennzoil Place, Houston, Texas 77002, attorney of record for Defendants, on this the 16th day of May, 1990.

/s/ SHANNON H. RATLIFF
Shannon H. Ratliff

[Appendix Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1011

EXXON CORPORATION,
Plaintiff,

v.

ANR PIPELINE COMPANY and
ANR SUPPLY COMPANY,
Defendants.

DEFENDANT ANR PIPELINE COMPANY'S RESPONSE TO MOTION FOR CLARIFICATION, OR, IN THE ALTERNATIVE, ANR'S MOTION FOR RECONSIDERATION OR CERTIFICATION OF ORDER COMPELLING DISCOVERY

I.

Background To This Motion

On June 15, 1990, the Court granted a motion to compel discovery filed by the Plaintiff, Exxon Corporation ("Exxon"). Exxon has asked the Court to clarify its order because the order referred to a discovery request that was not raised by Exxon in its motion, while the order was silent as to the discovery request that Exxon did raise in its motion. Due to the discrepancy between the motion and the order, the June 15 order may have been intended for entry in another case, and inadvertently bore the caption of this case. In any event, Exxon has asked the Court to issue an additional order clarifying the June 15 order. The instant motion is subject to Exxon's motion

for clarification. If the Court denies Exxon's motion because its June 15 order was intended to be issued in another case, ANR withdraws this motion as moot.

II.

Motion for Reconsideration

In its motion to compel discovery, Exxon requested ANR to produce all documents submitted by ANR to the Federal Energy Regulatory Commission ("FERC") from January 1983 to the present which relate to "take-or-pay," including ANR's Response to the FERC's Order 500 "Take-or-Pay Data Request." The documents covered by the request contain confidential information, including confidential information concerning the terms of ANR's settlements with other producers in similar litigation. As to such information, the FERC—the agency that ordered the information produced—has itself recognized that "[d]isclosure will . . . cause the pipeline substantial competitive harm in that producers will know the terms of settlements that have already been executed." Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol [FERC Docket No. RM87-34-059], Order Denying Release of Data (March 21, 1990), at p. 452922 (Appendix to ANR's Brief in Opposition to Exxon's Motion to Compel and in Support of ANR's Motion for Protective Order, Tab 4). Exxon itself has acknowledged in a proceeding before the FERC:

> Nothing is more confidential for a business entity than its bottom-line negotiation position. Current take-or-pay settlement negotiations between producers and pipelines are among the most complex, difficult, high-stakes negotiations this industry has

> ever seen. Public disclosure of precisely what a producer is willing to accept, or a pipeline is willing to give up, would be tremendously destructive to this ongoing process.

Joint Comments of Indicated Producers [FERC Docket No. RM87-34-000] (Oct. 13, 1987), at pp. 103-105 (Appendix to ANR's Brief in Opposition to Exxon's Motion to Compel and in Support of ANR's Motion for protective Order, Tab 4).

The Texas Court of Appeals for the Fourteenth District, in a recent order regarding the extent to which information pertaining to take-or-pay settlement agreements are discoverable, ordered that cash amounts contained in the settlement agreements were *not* discoverable, on the basis that "the cash amounts might be of interest to the parties here as *a comparative bargaining tool for their settlement purpose, but such an interest does not, in our opinion, satisfy the relevancy test for discovery.*" *Palo Duro Pipeline Co. v. The Honorable Anne Cochran*, No. A14-89-00928-CV (Tex. App.—Houston [14th Dist.] March 15, 1990), slip op. at 5 (emphasis added) (copy attached).

The information Exxon seeks here is similarly not relevant to any issue in this lawsuit. Exxon's purpose in seeking the information is solely to enhance its bargaining position in settlement negotiations. The information should not be ordered disclosed.

III.

Motion for Certification

In the alternative, if the Court orders the disclosure of this information, ANR respectfully requests that the

Court certify its order compelling discovery for immediate appeal under 28 U.S.C. § 1292(b). The Court's order compelling discovery involves a controlling question of law as to which there is substantial ground for differences of opinion, and an immediate appeal from the order may materially advance the ultimate termination of this litigation. The question of whether confidential information furnished to the FERC in its Order 500 proceeding is discoverable in civil litigation between producers and pipelines is a question of law of critical importance to the entire natural gas industry. The Federal Energy Regulatory Commission, the federal agency charged with responsibility for regulating that industry, has determined and advised that such information should not be disclosed. No federal court of appeals has ruled on the issue.

The federal courts have frequently recognized that interlocutory review of orders relating to important discovery and evidentiary questions can materially advance the ultimate termination of litigation, and have therefore permitted interlocutory review of such orders in many instances. In *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), the Court of Appeals for the Fifth Circuit considered whether a ruling that the attorney-client privilege could not be claimed by a corporation was immediately appealable. The Court of Appeals found that the order presented a " 'controlling question of law' as opposed to a question of fact or matter for the discretion of the trial court." 430 F.2d at 1097. Further, the Court of Appeals found that "[t]he appeal 'may materially advance the ultimate termination of the litigation,' " as "[t]he availability or unavailability of the testimony and documents sought may affect the disposition of . . . pending motions to dismiss."

Id. The Court held that "[r]eview under § 1292(b) is available where decision on an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal." *Id.; accord, Radiant Burners v. American Gas Assoc.*, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 376 U.S. 929 (1963). In another case, *Hyde Construction Co. v. Koehring Co.*, 455 F.2d 337 (5th Cir. 1972), the Court of Appeals held that an order compelling a party to produce a document it claimed was privileged was appropriate for immediate appeal. *Accord, Groover, Christie & Merritt v. LoBianco*, 336 F.2d 969 (D.C. Cir. 1964). In *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 335 F.2d 203 (7th Cir. 1964), the United States Court of Appeals for the Seventh Circuit allowed interlocutory review of an order ruling on the relevancy of certain information requested in discovery. As these decisions indicate, interlocutory orders relating to critical discovery and evidentiary issues, such as this Court's order, are appropriate for interlocutory appeal under 28 U.S.C. § 1292(b).

IV.

Conclusion

For the foregoing reasons, ANR requests that the Court reconsider its order compelling discovery and grant ANR's motion for protective order filed on June 6, 1990, or, in the alternative, certify its order for immediate appeal.

Respectfully submitted,

By: /s/ ROBERT C. WILLIAMS
Robert C. Williams
S.D. Tex. No. 1069
Attorney-in-Charge
2900 South Tower Pennzoil Place
Houston, Texas 77002
(713) 223-2900
Attorneys for Defendant
ANR Pipeline Company

Of Counsel:
Bracewell & Patterson
2900 South Tower Pennzoil Place
Houston, Texas 77002
(713) 223-2900

Peter R. Scullen
ANR Pipeline Company
500 Renaissance Center
Detroit, Michigan 48243
(313) 496-0200

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant ANR Pipeline Company's Response to Motion for Clarification, or, in the Alternative, ANR's Motion for Reconsideration or Certification of Order Compelling Discovery was forwarded to counsel for the Plaintiff, Mr. Shannon H. Ratliff, McGinnis, Lochridge & Kilgore, 1300 Capitol Center, 919 Congress Avenue, Austin, Texas 78701, by certified mail, return receipt requested on this 13th day of July, 1990.

By: /s/ ROBERT C. WILLIAMS
Robert C. Williams

[Attachments Omitted]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-2864

IN RE: ANR PIPELINE COMPANY,
PETITIONER.

PETITION FOR WRIT OF MANDAMUS

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Attorneys for Petitioner
ANR Pipeline Company

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. _____

IN RE: ANR PIPELINE COMPANY,
PETITIONER.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

ANR Pipeline Company
ANR Supply Company
Bracewell & Patterson (counsel)
The Coastal Corporation
Exxon Corporation
Mr. Edward de la Garza (counsel)
The Honorable Kenneth M. Hoyt
McGinnis, Lochridge & Kilgore (counsel)
Mr. Peter R. Scullen (counsel)

/s/ ROBERT C. WILLIAMS
Robert C. Williams
Attorney for Petitioner
ANR Pipeline Company

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-2864

IN RE: ANR PIPELINE COMPANY, PETITIONER.

PETITION FOR WRIT OF MANDAMUS

ANR Pipeline Company, a Defendant in Civil Action No. H-89-1011, captioned *Exxon Corporation v. ANR Pipeline Company and ANR Supply Company*, pending in the United States District Court for the Southern District of Texas, Houston Division, hereby petitions this Court to issue a writ of mandamus directing the Honorable Kenneth M. Hoyt, United States District Judge, to vacate the district court's order signed September 5, 1990, in which the district court's ordered ANR Pipeline Company to produce to Exxon Corporation (1) self-critical analyses that the United States Federal Energy Regulatory Commission ("FERC") ordered ANR to perform and submit to the FERC, with assurances of confidentiality, to enable the FERC to comply with a mandate issued by the United States Court of Appeals for the District of Columbia; and (2) documents that reflect the terms of settlement agreements that ANR has negotiated with other parties in litigation similar to the litigation pending in the district court below.

A. *Statement of Facts*

In this case, Exxon alleges that ANR breached certain quantity provisions, commonly known as "take-or-pay" provisions, contained in three gas purchase contracts between the parties. Hundreds of such "take-or-pay" cases

are pending in this circuit, involving millions, if not billions, of dollars, and the issue presented by this petition is of critical importance in these cases and, indeed, to the natural gas industry as a whole.

On July 14, 1989, Exxon requested that ANR produce for Exxon's inspection documents submitted by ANR to the FERC which "relate in any way to take-or-pay, including any response to the FERC 500 take-or-pay data request in Docket No. RM87-34-000." (Appendix, tab. 1, at 24). ANR produced all non-confiidential documents requested, but ANR objected to producing documents that had been filed with the FERC that contained confidential information. (Appendix, tab 2, at 35). The documents withheld consisted of (1) self-critical analyses that the FERC required ANR (in addition to forty-five other interstate pipeline companies) to perform to assist the FERC in complying with a mandate from the United States Court of Appeals for the District of Columbia Circuit; and (2) information respecting the terms of settlement agreements ANR had negotiated with other producers in other take-or-pay litigation. The information had been submitted to the FERC under assurances of confidential treatment by the FERC.

On May 16, Exxon moved to compel production of the confidential information (Appendix, tab 3). On June 6, ANR responded to the motion to compel (Appendix, tab 4); moved for a protective order (Appendix, tab 5); and requested oral argument on the issue (Appendix, tab 6).

On June 15, the district court granted Exxon's motion to compel, but the district court's order referred to a number other than the number of the document request

seeking confidential information filed with the FERC. *See* Order dated June 15, 1990 (Appendix, tab 7). On June 22, Exxon moved for an order clarifying the district court's June 15 order (Appendix, tab 8). On July 13, ANR filed a response to that motion (Appendix, tab 9). In its response, ANR requested that the district court certify its order compelling discovery for immediate appeal under 28 U.S.C. § 1292(b) if the intent of the order was to compel ANR to produce the confidential documents filed with the FERC. Exxon filed a reply brief (Appendix, tab 10).

On September 5, the district court granted Exxon's motion for clarification, and denied ANR's request for an order permitting an immediate appeal (Appendix, tab 11). Following the issuance of the district court's September 5 order, the parties attempted to resolve their dispute without the necessity of resort to this Court. Those efforts have not been successful. Accordingly, ANR has been forced to petition this Court for a writ of mandamus.

B. *Statement of Issue*

Whether ANR should be compeled to produce to Exxon (1) self-critical analyses that the FERC required ANR to perform to assist the FERC in complying with a mandate from the United States Court of Appeals for the District of Columbia Circuit; and (2) documents that reflect the terms of settlement agreements that ANR has negotiated with other parties in litigation similar to the litigation pending in the district court below.

C. *Relief Sought*

ANR requests that this Court issue a writ of mandamus directing the district court to vacate its order signed on September 5, 1990.

D. *Reasons Why Writ Should Issue*

ANR is an interstate gas pipeline company regulated by the FERC. In 1987, the United States Court of Appeals for the District of Columbia Circuit ordered the FERC to analyze and determine whether to invoke its power under the Natural Gas Act ("NGA") to modify or to set aside jurisdictional contracts with troublesome take-or-pay provisions. *See Associated Gas Dist. v. FERC*, 824 F.2d 981, 1027-1030, 1044 (D.C. Cir. 1987), *cert. denied sub nom., Interstate Natural Gas Ass'n v. FERC*, 485 U.S. 1006 (1988). The result of the Court of Appeals' mandate was the FERC's initiation of its order 500 data request as part of its Order 500 proceeding. In a notice of interim rule and statement of policy in that proceding, the FERC notified all pipelines:

> In order to make this reassessment, the [FERC] needs more information to analyze fully how effective and appropriate action under section 5 [of the NGA] would be in mitigating pipeline take-or-pay problems. To this end, the [FERC] intends to exercise its authority under NGA sections 10 and 14 and NGPA sections 501 and 508 to send to each interstate natural gas pipeline company a data request to determine the extent and nature of the pipelines' take-or-pay obligations with respect to the various NGPA pricing categories.

"Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000; Order No. 500], 52 Fed. Reg. 30,334, at 30,341 (August 14, 1987).

In its subsequent data request, the FERC sought industry-wide information by requiring forty-five pipelines,

including ANR, to provide extensive information and to perform numerous calculations respecting those pipelines' take-or-pay "obligations," prepayments, and settlements, among other matters. The FERC required these pipelines to calculate potential take-or-pay "exposure" following a methodology dictated by the FERC, not the methodology contained in the individual gas purchase contracts. (A copy of the FERC's Order 500 Take-or-pay Data Request is attached as Exhibit C to Tab 3 of the Appendix).

In its notice regarding its Order 500 Data Request, the FERC warned that "[p]ipelines failing to respond will be subject to civil penalties under NGPA Section 504(b)." 52 Fed. Reg. 30,334, at 30,341. However, the FERC assured those pipelines that they could request confidential treatment of their responses pursuant to a provision in the Code of Federal Regulations. *Id.* ANR requested confidential treatment of its Responses (Appendix, tab 4, at 244).

ANR's Response to the Order 500 Data Request is not the only information ANR has submitted to the FERC in the FERC's Order 500 proceeding. The FERC has requested other confidential information, including detailed information concerning ANR's settlements of other take-or-pay litigation, with assurances of confidential treatment. The information has been duly furnished to the FERC, with requests for confidential treatment.

The FERC has agreed to maintain the confidentiality of ANR's Response, as well as the confidentiality of the other information, and has refused to disclose this information to others. In an order denying a trade associations' recent attempt to obtain the information, the FERC found:

> There is no doubt that these data and materials submitted by the pipelines are sensitive commercial information. Disclosure will . . . cause the pipelines substantial competitive harm in that producers will know the terms of settlements that have already been executed. In addition, such disclosure will harm pipeline ratepayers and consumers because a lessening of the pipelines' bargaining power would result in less favorable settlements for the pipelines and the flowthrough of the attendant higher settlement costs to ratepayers and to consumers.

"Regulation of Natural Gas Pipeline After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-059], Order Denying Release of Data (March 21, 1990), at p. 452922 (Appendix, tab 4, at 267). The United States Court of Appeals for the District of Columbia Circuit has affirmed the FERC's position. *See American Gas Assoc. v. Federal Energy Regulatory Comm.*, No. 87-1588, slip op. at 23 n.3 (D.C. Cir. August 24, 1990) (Appendix, tab 12).

Exxon itself has opposed disclosure of the same information it sought by its motion to compel. On whether settlement information furnished to the FERC in the Order 500 proceeding should be disclosed, Exxon, along with other producers, argued:

> [O]pen disclosure on the public record of all terms of each individual settlement is neither necessary nor advisable, and is likely to either discourage settlements or to increase their costs. . . .
>
> Nothing is more confidential for a business entity than its bottom-line negotiation position. Current take-or-pay settlement negotiations between producers and pipelines are among the most complex,

> difficult, high-stakes negotiations this industry has ever seen. Public disclosure of precisely what a producer is willing to accept, or a pipeline is willing to give up, would be tremendously destructive to this ongoing process.
>
> . . . . [E]ach party to a particular settlement is bound to have numerous other negotiations still underway. Negotiating when the other side has seen your hole card is an exercise in futility.
>
> . . . . Another . . . result will be that costs of settlements will increase as each new disclosure of a particular settlement agreement becomes the floor-bargaining position for the next negotiation. Requiring full disclosure may also result in revealing a producer's overall marketing strategy to its competitors, which could be anti-competitive, and in conflict with federal antitrust policies. Disclosure of a producer's marketing strategy could have a substantial impact upon both supply availability and price in certain markets.
>
> For these reasons, *Producers* [*including Exxon*] *urge that absolutely minimum disclosure, and maximum protection of data, be made a central part of Order No. 500.*

"Joint Comments of Indicated Producers," FERC Docket No. RM87-34-000 (Oct. 13, 1987), at 103-105 (emphasis added) (relevant excerpts) (Appendix, tab 4, at 282-285).

The federal courts recognize a privilege from disclosure through discovery for mandatory special reports to governmental agencies which contain self-critical anlyses. *See, e.g., Gillman v. United States,* 53 F.R.D. 316 (S.D. N.Y. 1971); *O'Connor v. Chrysler Corp.,* 86 F.R.D. 211, 218 (D. Miss. 1980); *Written v. A. H. Smith & Co.,* 100 F.R.D. 446 (D. Md. 1984), *aff'd,* 783 F.2d 306 (4th

Cir. 1986); *Hoffman v. United Telecommunications, Inc.*, 117 F.R.D. 440 (D. Kan. 1987); *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971). This "self-critical analyses" privilege is described in *Webb v. Westinghouse Electric Corp.*, 81 F.R.D. 431 (E.D. Pa. 1978):

> *First*, materials protected have generally been those prepared for mandatory governmental reports. *Second*, only subjective, evaluative materials have been protected. . . .
>
> *Finally*, courts have been sensitive to the need of the plaintiffs for such materials, and have denied discovery only where the policy favoring exclusion of the materials clearly outweighed plaintiff's need.

Id. at 434 (emphasis added). The policy behind the privilege "recognizes that voluntary compliance by [businesses] with federal . . . laws is essential" for the laws' implementation. *Id.* at 433. The privilege encourages those subject to governmental requests for information to be "candid and forthright" in responding. *Id.* Any disclosure of the information through discovery would have a "chilling effect" on voluntary compliance with government requests for information and self-critical studies. *Id.*

As an example of the privilege's application, in *Roberts v. Carrier Corp.*, 107 F.R.D. 678 (N.D. Ind. 1985), the court held that certain product information submitted by the defendant to the Consumer Product Safety Commission was protected from discovery. In that case, the court noted that the "public policy behind the privilege is 'to ensure fairness to persons *required by law to engage in self-evaluation* . . . .'" *Id.* at 684 (citing *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211 (D. Mass. 1980)).

The documents at issue here fall squarely within the self-critical analysis privilege. First, ANR's Response was prepared and submitted in response to the mandate of a governmental agency. The FERC directive ordering preparation of the Response stated: "[Y]ou are hereby directed to respond in full," with civil penalties for noncompliance. 52 Fed. Reg. 30,341.

Secondly, the information provided by ANR was "subjective, evaluative material." Exxon, in its own Response to the Data Request, expressed its "concern" that the FERC's format was entirely subjective. Exxon observed: "Exxon is concerned that the accuracy of the Commission's data base is dependent upon the *subjective interpretation of the contracts and data request*" (Appendix, tab 4, at 342).

Finally, the policy favoring protecting self-critical analyses from disclosure outweighs any need Exxon may have for the Response in this case. Exxon argued to the district court that ANR's Response is relevant to this lawsuit because, according to Exxon,

> the information which ANR seeks to shield from discovery in this proceeding will show that ANR has reported to the FERC that it owes take-or-pay deficiencies to its producers under the terms of gas purchase contracts with other producers similar to ANR's contracts with Exxon, notwithstanding the governmental regulation force majeure defense it alleges in this suit and has alleged in other such suits.

Appendix, tab 3, at 74. However, Exxon, in its own Response to the Order 500 Data Request, stated that, because of the format in which the Request is presented,

it does not elicit accurate reporting of take-or-pay deficiencies. Exxon's Response stated:

> [T]he requested format seems to be flawed in several respects. For example, Schedule No. 4 'Take-or-Pay History' requires the pipeline to provide the physical annual deliverability of the gas covered by the contract and the annual take-or-pay obligation as a percentage of deliverability. The pipeline subtracts from this quantity the quantity of gas actually purchased and the quantity of gas released for which a take-or-pay credit was received. This then determines the 'take-or-pay' quantity obligation. Determining the pipeline's take-or-pay quantity obligation, however, is not that simple. There are any number of other adjustments that are needed to determine the pipeline's 'take-or-pay' obligations that do not appear to be reflected in the Commission's request. *Adjustments for quantities not taken but excused as a result of force majeure or excused as a result of the producer's failure to deliver are two examples of the adjustments that must be considered under most contracts to get an accurate picture of the pipeline's outstanding 'take-or-pay' obligation.*

Appendix, tab 4, at 209.

Thus, Exxon took the position in its comments to the FERC that the methodology mandated by the FERC in its Take-or-Pay Data Request did not yield information that was truly probabative of a pipeline's take-or-pay obligations. In Exxon's own words, "[t]here are any number of adjustments . . . , [such as] [a]djustments for quantities not taken but excused as a result of force majeure . . . ," that are excluded by the methodology mandated by the FERC. Exxon's position before the district court and its position before the FERC are directly

contrary to one another; as shown by Exxon's comments before the FERC, Exxon itself realizes that ANR's Response to the Take-or-Pay Data Request has no relevance to individual producer's claims against pipelines for allegedly failing to comply with the take-or-pay provisions of individual gas purchase contracts.

Judge H. Dale Cook, United States District Court Judge for the Northern District of Oklahoma, has considered whether ANR's Response is relevant and thereby subject to discovery by producers in take-or-pay litigation. In *Dyco Petroleum Corp. v. ANR Pipeline Co.*, No. 86-C-1097-C (N.D. Okla.), Judge Cook ruled that "[h]ow [ANR] fills out forms to FERC doesn't have anything to do with this case." (Appendix, tab 4, at 327). *See also Palo Duro Pipeline Co. v. The Honorable Ann Cochran*, 785 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1990) ("the cash amounts [of take-or-pay settlement agreements] might be of interest to the parties here as a *comparative bargaining tool for their settlement purpose, but such an interest does not, in our opinion, satisfy the relevancy test for discovery*") (emphasis added).

Balanced against this dubious relevance, an order directing that the documents be produced could dampen regulated entities' willing cooperation with agency directives, and could undermine federal agencies' ability to obtain the information they require to fulfill their statutory mandate.

E. *Conclusion*

The district court judge abused his discretion in ordering that ANR produce to Exxon self-critical analyses that an agency of the United States government had required

ANR to perform for the agency's use in complying with a mandate of a United States Court of Appeals. The district court further abused his discretion in ordering ANR to produce documents that set forth the terms of settlement agreements that it had reached with other parties in litigation similar to the litigation pending in the district court. ANR respectfully requests that this Court of Appeals issue a writ of mandamus ordering that the district court judge vacate the order of September 5, 1990.

F. *Excerpted Record*

The following relevant excerpts from the record in this case are appended to this Petition in the order set forth below:

1. Plaintiff's First Set of Interrogatories, Requests for Admission, and Request for Production of Documents Propounded to Defendant ANR Pipeline Company.
2. Defendant ANR Pipeline Company's Answers, Objections, and Responses to Plaintiff's First Set of Interrogatories and Request for Production of Documents.
3. Plaintiff Exxon Corporation's Motion to Compel.
4. Defendant ANR Pipeline Company's Brief in Opposition to Plaintiff Exxon Corporation's Motion to Compel and In Support of ANR Pipeline Company's Motion for Protective Order.
5. Defendant ANR Pipeline Company's Motion for Protective Order.
6. Defendant ANR Pipeline Company's Request for Oral Argument on its Motion for Protective Order and Plaintiff Exxon Corporation's Motion to to Compel.

7. Order dated June 15, 1990.
8. Motion for Clarification.
9. Defendant ANR Pipeline Company's Response to Motion for Clarification, or, in the Alternative, ANR's Motion for Reconsideration or Certification of Order Compelling Discovery.
10. Plaintiff Exxon Corporation's Reply to Defendant ANR Pipeline Company's Response to Motion for Clarification, or, in the Alternative, Exxon's Response to ANR's Motion for Reconsideration or Certification of Order Compelling Discovery.
11. Order of Clarification dated September 5, 1990.
12. *American Gas Association v. Federal Energy Regulatory Commission*, No. 87-1588, slip op. (D.C. Cir. August 24, 1990).

Respectfully submitted,

BRACEWELL & PATTERSON
By: /s/ ROBERT C. WILLIAMS
Robert C. Williams
2900 South Tower Pennzoil Place
Houston, Texas 77002
(713) 223-2900

Attorneys for Petitioner
ANR Pipeline Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Mandamus was forwarded to the Honorable Kenneth M. Hoyt, United States District Court Judge, Southern District of Texas, Houston Division, Courtroom 9A, and to counsel for Exxon Corporation, Mr. Shannon H. Ratliff, McGinnis, Lochridge & Kilgore, 1300 Capitol Center, 919 Congress Avenue, Austin, Texas 78701, by certified mail, return receipt requested, on this 10th day of October, 1990.

/s/ ROBERT C. WILLIAMS
Robert C. Williams

[Appendix Omitted]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-2864

IN RE: ANR PIPELINE COMPANY,
PETITIONER.

PETITIONER ANR PIPELINE COMPANY'S PETITION FOR REHEARING

ROBERT C. WILLIAMS

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ANR Pipeline Company

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-2864

IN RE: ANR PIPELINE COMPANY,
PETITIONER.

PETITIONER ANR PIPELINE COMPANY'S
PETITION FOR REHEARING

ANR Pipeline Company ("ANR") respectfully petitions the honorable judges of this Court to grant rehearing and reconsideration of the denial of ANR's petition for a writ of mandamus in this proceeding. In support hereof, ANR shows the Court as follows:

1. In denying ANR's petition for a writ of mandamus, the Court leaves undisturbed an order by the United States District Court for the Southern District of Texas which compels ANR to produce in discovery (a) confidential information regarding settlements with third parties in similar litigation that ANR was compelled by the Federal Energy Regulatory Commission ("FERC") to compile and to submit to the FERC; and (b) self-critical analyses that ANR was required by the FERC to perform and to submit to the FERC for the FERC to comply with a mandate of the United States Court of Appeals for the District of Columbia.

2. This case raises the important question of whether confidential commercial information that a corporation is required by a federal agency to compile and to submit to the agency for the agency to perform

its regulatory duties should be made available by the federal courts to adverse parties for use against the corporation in settlement negotiations. The information at issue in this case includes detailed information about the terms of settlements between ANR and producers in take-or-pay litigation. ANR and the producer in this case are engaged in settlement negotiations. The information has no relevance to any issue in the case. ANR submitted this information to the FERC in good faith, with assurance of confidential treatment by the FERC. Disclosing the terms of ANR's previous settlements practically ensures that the producer in this case will not settle with ANR on terms less favorable than the most favorable terms that ANR has accorded other producers. To permit producers to exploit pipelines' good faith compliance with FERC directives to gain an advantage in settlement negotiations is fundamentally unfair, and undermines both the policy favoring settlements and the policy that encourages those who are regulated, such as interstate pipeline companies, to cooperate with those who regulate them.

3. The issue to be decided in this case has far-reaching consequences for the natural gas industry. Thousands of take-or-pay claims, representing billions of dollars of exposure, have been settled in the last five years. Hundreds of take-or-pay lawsuits remain pending. The parties in these lawsuits, as well as the Federal Energy Regulatory Commission, have a vital interest in the Court's decision on this important question. No other federal court of appeals has addressed the question. ANR respectfully re-

quests that the Court grant this petition for rehearing so that all interested parties, including the Federal Energy Regulatory Commission, may submit briefs fully setting forth the important public policy interests placed in jeopardy by the order of the district court below.

Respectfully submitted,

BRACEWELL & PATTERSON
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(713) 221-1212 Telecopier
Attorneys for Petitioner
ANR Pipeline Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner ANR Pipeline Company's Petition for Rehearing was forwarded to the Honorable Kenneth M. Hoyt, United States District Court Judge, Southern District of Texas, Houston Division, Courtroom 9A, and to counsel for Exxon Corporation, Mr. Shannon H. Ratliff, McGinnis, Lochridge & Kilgore, 1300 Capitol Center, 919 Congress Avenue, Austin, Texas 78701, by certified mail, return receipt requested, on this 26th day of October, 1990.

/s/ ROBERT C. WILLIAMS
Robert C. Williams

ANR PIPELINE COMPANY
a subsidiary of the Coastal Corporation

November 2, 1987

C. SCOTT HOBBS
Senior Vice President
Gas Supply

Honorable Lois D. Cashell, Acting Secretary
Federal Energy Regulatory Commission
825 North Captital Street, N.E.
Washington, D.C. 20426

Dear Ms. Cashell:

Pursuant to the Commission's take-or-pay data request of August 26, 1987, ANR Pipeline Company ("ANR") hereby submits its responses set forth on magnetic tape and paper copy.

ANR has done its best to respond to the massive data request as completely as possible within the extremely short time period permitted. However, because of the short time, and because of the way in which data is maintained by ANR, it has been necessary for ANR to make certain necessary and reasonable adjustments to the Commission's request as described on Schedule 7 of ANR's response. Further, ANR has necessarily made certain assumptions in responding to the data request because of inability to predict many future events. ANR has attempted to give the Commission a reasonable understanding of ANR's take-or-pay exposure. For these reasons, ANR requests all necessary waivers of any specific elements of the Commission's data requests, in order to accommodate the assumptions and adjustments made by ANR in its responses.

ANR also requests that all of the information contained on the magnetic tape and paper copy submitted herewith be given confidential treatment under Section 388.110 of the Commission's Regulations, and that all of ANR's responses be exempt from disclosure under any Freedom of Information Act request. As set forth in ANR's application for rehearing of the data request, the release of the data in ANR's responses could allow such information to be misused in another tribunal. Further, ANR requests that it not be required to maintain these data responses in its files after submission to the Commission.

As requested by the Commission, ANR also submits the following information:

File Name:	ANPL. FERC. File
File Attributes:	9 b.p.i. Label—std (IBM) block size 32749 record size 185 variable block record
Recording Density:	6250

In conclusion, ANR states that the information listed on the paper copy is the same as the information on the magnetic tape, and that the contents of the paper copy and magnetic tape are true to the best knowledge and belief of the undersigned.

Respectfully submitted,

ANR PIPELINE COMPANY
/s/ C. SCOTT HOBBS
C. Scott Hobbs
Senior Vice President

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry L. Langdon.

Docket No. RM87-34-059

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol

ORDER DENYING MOTION TO RELEASE DATA

(Issued March 21, 1990)

In Order 500-H,[1] the Commission relied on data supplied by the pipelines to quantify total future relief of nearly $28 billion as a result of producer-pipeline settlements.[2] The pipelines supplied the data and accompanying materials in pipeline rate proceedings[3] with a request that they be withheld from public disclosure. On January 30, 1990, the Associated Gas Distributors (AGD) filed a request to deny pipeline requests for privileged treatment, and for publication of the data and accompanying materials. AGD seeks access to the data on the ground that it was relied upon by the Commission in Order No.

1. Order No. 500-H, III FERC Stats. & Regs. ¶ 30,867 (1989).

2. *Id.* at p. 31,522; slip op. at 41, 42.

3. *E.g., ANR Pipeline Co.*, 47 FERC ¶ 61,146 at p. 61,439 (1989). The information supplied at times referred to information submitted in earlier pipeline rate proceedings. In addition, some information was provided in other contexts, such as letters to the Commission.

500-H.[4] The Commission denies AGD's January 30, 1990 motion.

In Order No. 500-H,[5] the Commission identified data supplied by pipelines in pipeline rate proceedings to help support its determination that negotiated resolution of take-or-pay exposure had been effective. In addition, the Commission addressed *AGD-I's*[6] concern by finding that the pipelines had "sufficient bargaining power to negotiate settlements resolving their take-or-pay problems."[7] The data indicated that in their take-or-pay settlements the pipelines had obtained over $16 billion in past relief and nearly $28 billion in future relief, for total relief of $44 billion. In return for this relief, the pipelines had paid producers about $8.2 billion or 18.6 cents on the dollar.[8]

The Commission required the data and accompanying materials from the pipelines in connection with the pipelines' proposals to recover their take-or-pay settlement costs in various rate proceedings. For example, in a number of orders issued on April 28, 1989, in connection with those proposals, the Commission directed the pipelines to file their claimed take-or-pay buy-out and buy-

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4. In Order No. 500-I, issued February 12, 1990, the Commission stated that it would address AGD's motion in a future order after it received answers to AGD's motion. Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol issued February 12, 1990, slip op. at 8 n.9.

5. See n.1, *supra*.

6. Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987).

7. Order No. 500-H, *supra* n.1 at p. 31,526, slip op. at 51.

8. *Id.* at p. 31,526; slip op. at 51, 52. The future relief consisted in the main of avoided future take-or-pay (*i.e.* estimated future take-or-pay liabilities not paid) and benefits of contract reformation (reduced prices on estimated future takes).

down costs, copies of all settlements with producer suppliers, and an explanation of the take-or-pay exposure for each year settled and the amount of exposure that was eliminated through the settlement, all to the extent that the pipeline had not already filed that information.[9] The pipelines complied by reporting their information in response to the April 28, 1989 orders or by referring to other earlier filings or both.

AGD's January 30, 1990 Request

In its January 30, 1990 request for publication of data, AGD argues as follows:

> In Order No. 500-H, FERC made public the total dollar amount of future benefits reported by each pipeline. Table 5 and Appendix B. The Commission did not, however, elaborate on the definitions or assumptions underlying each pipeline's report, which are of course critical for interpreting concepts as subjective as "Avoided Future Take-or-Pay," "Benefits of Contract Reformation," "Other Reported Relief," and "Total Future-Oriented Relief." *See* Table 5. Nor did FERC provide the itemized amounts, by contract or producer, that add up to the total relief claimed by each pipeline. The Commission did, however, itself recognize the potential frailty of its own aggregate data. *See* Order No. 500-H at 21 n.36, 42 (Table 5, note), and Appendix B (note at p. 1). These caveats underscore the need of the parties to investigate and evaluate the underlying data.[10]

AGD adds that both "fairness and due process"[11] and "the extraordinary importance of the underlying data that

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9. *E.g.*, Texas Gas Transmission Corp., 47 FERC ¶ 61,141 at p. 61,417 (1989).

10. Request at 3.

forms the basis for the Commission's decisions concerning FERC's 'jurisdictional responsibilities' under NGA sections 5 and 7 therefore compels public disclosure under the Commission's own regulations."[12] AGD refers to the Commission's order making public the aggregate data[13] as recognizing the need for disclosure as directed by the court in *American Gas Ass'n v. FERC (AGA)*.[14] Last, AGD "requests that the Commission deny the pipelines' requests for privileged treatment of the material submitted in response to the April 28 Orders, and publish all data, workpapers, and other documentation which underlie the findings made in Order No. 500-H at 42, in Table 5, and in Appendix B."[15]

AGD made similar arguments in its request for rehearing of Order No. 500-H. AGD argued that the Commission relied on untested evidence which is not a matter of record to obtain a "grossly distorted picture of the natural gas industry and the posture of each of the industry sectors."[16] AGD claims that the use of the particular data is flawed for at least three reasons. First, the pipelines had "every reason to overstate the benefits of their bargains."[17] "Second, there has been no opportunity to cross-examine or in any way test this data. Third, the qualification of the future benefits the pipelines gained is necessarily premised upon extremely speculative assumptions

11. *Id.*

12. *Id.* at 4.

13. Trunkline Gas Co., *et al.*, 49 FERC ¶ 61,227 (1989).

14. 888 F.2d 136 (D.C. Cir. 1989).

15. Request at 5.

16. Request for Rehearing at 55, 56.

17. *Id.* at 56.

about what prices the pipelines would have had to pay in future years absent the renegotiation."[18]

The Pipelines' Responses

The responding pipelines[19] oppose AGD's request for a number of reasons. First, they argue that AGD's motion is prohibited by Rule 212(a)(3) of the Commission's Rules of Practice and Procedures which provides that "[a] motion may be filed . . . [i]n any proceeding except an informal rulemaking proceeding."[20] They add that AGD is merely attempting to evade the fact that it is not a party to the proceedings in which the data was submitted under protective order. Second, they argue that AGD has failed to exhaust its available procedures by not filing a request for release of the information under the Freedom of Information Act (FOIA). Third, they argue that the information is exempt from public disclosure under both the FOIA and the Commission's regulations which exempt "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[22] They add that the Commission's release of the information to the public would be an abuse of discretion because the release would cause substantial competitive harm to the pipelines and impair

18. *Id.*

19. ANR Pipeline Company, Arkla Energy Resources, Panhandle Eastern Pipe Line Company and Trunkline Gas Company jointly Sea Robin Pipeline Company, Tennessee Gas Pipeline Company, and United Gas Pipe Line Company.

20. 18 C.F.R. § 385.212(a)(3) (1989).

21. 5 U.S.C. § 552. Requests are filed under section 388.108 of the Commission's regulations.

22. Section 1(b)(4) of the FOIA, 5 U.S.C. § 552(b)(4); 18 C.F.R. § 388.107(d) (1989).

the Commission's ability to obtain confidential information in the future. They further contend that release of the confidential contract and settlement information would harm their bargaining positions with producers. For example, ANR states:

> To illustrate the competitive harm which would result, ANR states that it is presently involved in take-or-pay negotiations with producers as well as in litigation on take-or-pay claims before a number of courts. If the Commission were to release publicly the contract and settlement information submitted confidentially by ANR, ANR would be placed in an inferior bargaining position with producers and at a competitive disadvantage in the marketplace. The detailed information sought here by AGD would not only reveal ANR's negotiating positions and the limits of its settlement terms, but it would reveal the settlement terms and settlement figure for each individual contract. ANR's highest payment to a producer would become a floor for other producers in their negotiations with ANR and other producers would insist on settlement terms as favorable, if not more favorable, than that received by their counterparts. The release of such unaggregated information runs contrary to the competitive market policies advocated by the Commission and the release thereof would only serve to exacerbate the take-or-pay problems which the Commission is presently attempting to resolve.[23]

Arkla argues that AGD has not shown that it needs the information in an unaggregated state so as to justify

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23. ANR's Comments and Answer at 7. *See also* Arkla's Answer at 4, 5; Panhandle/Trunkline's Answer at 11, 12; Sea Robin's Answer at 5, Tennessee's Answer at 4, 5; and United's Answer at 5.

disclosure. Tennessee states that "disclosure of the raw, pipeline-specific data will not eliminate the subjectivity inherent in concepts such as 'Future Take-or-Pay,' etc."[24] United and Sea Robin both state that "AGD's argument . . . amounts to no more than a reminder that the Commission has not disclosed the requested information. . ." [25] and that AGD's apparent intent "to conduct its own evaluation of the underlying information . . . provides the Commission no basis on which to release sensitive commercial information to AGD." [26] Next, United and Sea Robin argue that Commission disclosure would violate the Trade Secrets Act.[27] Last, Arkla and ANR contend that *AGA* does not require the release of the confidential unaggregated data. Arkla argues that "*AGA* requires, at most, that the Commission make public its analysis of data it has reviewed." [28]

Discussion

The information requested by AGD was filed with the Commission with requests under section 388.112 of the Commission's regulations that it be exempt from the mandatory public disclosure requirements of the Freedom of Information Act and that it should be otherwise with-

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24. Tennessee's Answer at 6.

25. United's Answer at 7; Sea Robin's Answer at 7.

26. United's Answer at 8; Sea Robin's Answer at 8. Panhandle/Trunkline state that "AGD has not shown why the Commission's prior release of such data *in aggregate form* is not sufficient for the purpose of challenging on judicial review the Commission's decision in Order Nos. 500-H and 500-I not to take meaningful action under sections 5 and 7 of the NGA to resolve the take-or-pay problem." Answer at 5 (emphasis in original).

27. 18 U.S.C. § 1905.

28. Answer at 6.

held from public disclosure.[29] The public may seek to acquire that information by filing a FOIA request under section 388.108 of the Commission's regulations.[30] In addition, the Commission *sua sponte* may "release information as necessary to carry out its jurisdictional responsibilities."[31] AGD's request is not a FOIA request. Rather, AGD's request was made as a motion pursuant to Rule 212 of the Commission's Rule of Practice and Procedure.[32] In effect, AGD has requested the Commission to take action *sua sponte* to deny the pipelines' requests for privileged treatment of the material submitted in response And the Commission will treat AGD's motion as such a to the April 28, 1989 orders and to publish that material. request.

While AGD's request is inappropriate under the Commission's motion rule,[33] the Commission will consider AGD's request as an argument that the Commission should release the data too the public in connection with the final rule. In addition, the Commission will discuss AGD's related arguments on rehearing that use of the data in Order No. 500-H was flawed because the data were biased, untested and premised on extremely speculative assumptions. In summary, AGD argues in both its request and on rehearing that fairness compels disclosure of the unaggregated data and underlying materials so that AGD and other parties can evaluate through cross-examination the aggregate data used by the Commission in the final rule.

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29. 18 C.F.R. § 388.112 (1989).
30. 18 C.F.R. § 388.108 (1989).
31. 18 C.F.R. § 388.112(c)(1)(i) (1989).
32. 18 C.F.R. § 385.212 (1989).
33. 18 C.F.R. § 385.212(a)(3) (1989), quoted *supra* p. 4.

The Commission in Order No. 500-H used data supplied by the pipelines. The pipelines set forth the data in a variety of formats. Most set forth the relief obtained from each producer with whom settlements were entered into. Some pipelines, however, reported an aggregate amount of relief obtained in all settlements. Most pipelines also reported separately the relief obtained relating to the past and that relating to the future.[34] In some cases while the pipelines' response to the April 28 order did not separately state past and future relief, the summaries of individual settlements previously filed by the pipeline did specify future relief for at least some settlements.

In July and August, 1989, Commission staff sent a letter requesting additional information to two pipelines which appeared not to have fully complied with the Commission's April 28 orders.[35] These pipelines sent their responses in August, 1989. On October 6, 1989, after staff had aggregated the data supplied by each pipeline, the General Counsel, as Commission designee, gave notice to the pipelines that the Commission intended to release their take-or-pay data in aggregate form. The General Counsel included with the notice given each pipeline an appendix showing the amounts for that pipeline to be made public. Several pipelines corrected their

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34. Six pipelines—CIG, Quester, Sea Robin, Texas Gas, Valero, and West Texas Gathering—reported no future relief.

35. The staff letters requested information with respect to past and future take-or-pay exposure settled. They did not request information concerning non-take-or-pay benefits of contract reformation, such as reduced prices for gas actually taken in the future. In addition, one other pipeline sent information in response to a telephone request by staff.

amounts,[36] and Table 5 as ultimately included in Order No. 500-H includes those corrections.

Some pipelines objected to the Commission's proposed release of the aggregate information, on the ground that release of even aggregate data would compromise their litigation and settlement positions. On November 24, 1989, the Commission weighed the pipelines' claims for confidential treatment against the need to make use of the data in the rulemaking and denied the pipelines' request for treatment of the "aggregate take-or-pay data as confidential under 18 C.F.R. § 388.112."[37] It is these aggregate data that the Commission used in Order No. 500-H.[38]

Accordingly, in all cases, the take-or-pay relief amounts used in Table 5[39] and Appendix B[40] of Order No. 500-H were derived from information supplied by pipelines in their various take-or-pay recovery dockets, or in response to the Commission's General Counsel's notification of release of the aggregate data in connection with the November 24, 1989 order.

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36. Columbia made a correction to its take-or-pay costs. Transcontinental Gas Pipe Line Corporation increased its total relief from $3.9 billion to $5.9 billion and Tennessee reduced its total relief from $3.9 billion to $5.9 billion and Tennessee reduced its total relief from advised the Commission that their total relief may have been understated by about $500 million and $1.1 billion, respectively. Since Panhandle and Trunkline did not specify the exact amounts by which their relief was understated, the Commission did not modify Table 5 to reflect their assertions. Order No. 500-H, *supra*, n.1 at p. 31,522, Table 5 n.4, slip op. at 42. Table 5 n.4.

37. Trunkline Gas Co., *et al.*, 49 FERC ¶ 61,227 (1989). In addition, most of the data and accompanying material supplied by the pipelines are subject to protective orders in their respective proceedings.

38. *E.g.*, Order No. 500-H, *supra* n.1 at p. 31,526, slip op. at 51, 52.

39. *Id.* at p. 31,522 and slip op. at 42.

40. Appendix B is found with the slip op. order only.

For the majority of pipelines, the Commission used the summary amounts and categories given by pipelines in response to the Commission's requirements that relief information be provided. In many of these cases, information was aggregated from several filings, as pipelines had made more than one take-or-pay recovery filing.

In a few instances, the Commission aggregated the data from individual settlements, or settlement summaries filed in take-or-pay cost recovery proceedings.[41] In these cases, it appears that take-or-pay relief may actually have been substantially understated, as the Commission did not impute relief where relief was not specifically identified by the pipeline.[42]

In sum, the Commission relied on the estimated quantifications of future relief provided by the pipelines in response to Commission direction in rate proceedings with respect to pipeline proposals to recover their take-or-pay costs. The Commission aggregated the numbers supplied by the pipelines and then used the aggregated numbers in Order No. 500-H. There was no additional analysis behind the data supplied by the pipelines.

In these circumstances, the Commission believes that it has complied with the procedural requirements for an informal rulemaking. The Commission is not required to use formal, trial-type proceedings when, as here, it employs notice and comment rulemaking procedures.[43]

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41. In the case of Northern Natural Gas Company, the Commission divided relief between past and future relief based on the pipeline's allocation of settlement payments to past and future relief.

42. This is the case, for example, with Panhandle and Trunkline, cited in the notes to Table 5 of Order No. 500-H. See n.36, *supra*.

43. American Public Gas Association v. FERC, 567 F.2d 1016, 1064-1067 (D.C. Cir. 1977).

While AGD is not entitled to cross-examine other parties[44] or to discovery in the rulemaking proceeding, it has had an opportunity to comment in its rehearing request on the data used by the Commission, and it remains free to comment on the use of that data on appeal. This is not a case in which the agency has relied on a study which was not published at all. In Order No. 500-H, the Commission published in Table 5 the industry-wide figures that all pipelines had received $16 billion in past relief and almost $28 billion in future relief, or total relief of $44 billion in return for payments of 18.6 cents on the dollar. The Commission also published the aggregate figures for each pipeline from which the industry-wide figures were calculated. These included each pipeline's settlement cost, its accrued take-or-pay liability resolved, its total future oriented relief broken down between avoided future take-or-pay, benefits of contract reformation, and other reported relief,[45] and the calculation from these figures of settlement payments as a percent of total relief.

The Commission has not released the payments made and the relief reported under contracts with individual producers or in individual settlements. It is these amounts from which the aggregate figures for many pipelines were

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44. *Id.*

45. In some cases the pipeline had simply reported furture relief without breaking it down in these categories in any of its filings with the Commission. In these cases, as stated in Table 5, the Commission showed the future relief as avoided take-or-pay. Thus, the figures for avoided take-or-pay may in some instances include some benefits from contract reformation. In reaching its decisions in Order No. 500-H, the Commission did not rely on the separate amounts for different types of future relief but only on the total for all future relief.

calculated.[46] Whether AGD and others should have access to this underlying information involves a balancing of their needs for further information to meaningfully comment on the final rule against the harm that could result to the pipelines and the public from disclosure of the additional information. There is no doubt that these data and materials submitted by the pipelines are sensitive commercial information. Disclosure will, as described by ANR, cause the pipelines substantial competitive harm in that producers will know the terms of settlements that have already been executed. In addition, such disclosure will harm pipeline ratepayers and consumers because a lessening of the pipelines' bargaining power would result in less favorable settlements for the pipelines and the flowthrough of the attendant higher settlement costs to ratepayers and to consumers.

In a rulemaking proceeding in which a central issue has been the argument that the Commission should take further action to provide pipelines with additional take-or-pay relief, it was entirely reasonable for the Commission to consider the figures that the pipelines themselves had submitted on the take-or-pay relief they had achieved in settlements with producers. While the weight to be accorded evidence may be affected by the failure to subject the evidence to cross-examination,[47] the information is sufficiently reliable for the purposes for which the Commission used it. In the first place, it is not necessary for the amount of future relief to be exactly $28 billion or total relief to be precisely 18.6 cents on the dollar to validate the Commission's judgment that the

46. Some pipelines provided only aggregate data.

47. American Public Gas Association v. FPC, 567 F.2d 1016, 1067) (D.C. Cir. 1977).

pipelines have adequate bargaining power to negotiate reasonable settlements. This is not a rate case in which small differences in particular figures may have a significant rate impact. Order No. 500-H is a generic rulemaking dealing with an industry-wide set of circumstances. For the general purpose of showing adequate bargaining power, the data we used were more than sufficient.

AGD argues that the pipelines had an incentive to overstate their future relief. In the take-or-pay settlements, pipelines obtained reduced take-or-pay amounts and market-out clauses and these contractual adjustments provided future relief that is clearly of substantial value. The pipelines submitted the information relied on by the Commission, in various Commission rate proceedings and in response to Commission inquiries when the pipelines knew that the Commission was considering whether or not to invoke NGA section 5 with respect to take-or-pay. The pipelines knew that the Commission had before it the remand in *Associated Gas Distributors v. FERC.*[48] In addition, the Commission used similar pipeline data in Order No. 436 itself in considering the issue of pipeline ability to settle take-or-pay. Moreover, on October 6, 1989, the General Counsel, as the Commission's designee, notified the pipelines that she was releasing their take-or-pay data in aggregate form.[50] The notification included an appendix which set forth the aggregate past and future reported take-or-pay relief. Several pipelines provided

48. 824 F.2d 981 (D.C. Cir. 1987).

49. FERC Stats. & Regs., Regulations and Preambles 1932-1935, ¶ 30,665 at p. 31,364 (1983).

50. See Trunkline Gas Co., 49 FERC ¶ 61,227 issued November 24, 1989. Order No. 500-H issued December 13, 1989.

corrected totals.[51] Hence, any pipeline's reason to overstate with respect to an inquiry into the prudence of settlement costs should have been offset by the knowledge that the information could be used in making a generic decision not to invoke NGA section 5. Last, no pipeline questioned the accuracy of the aggregate data in their requests for rehearing of Order No. 500-H.

In addition, if anything, the $44 billion may understate past, future and total relief. As stated above, Panhandle and Trunkline have advised the Commission that total relief may be understated by $1.6 billion.[52] Moreover, several pipelines did not report any future relief.[53] However, the Commission has determined by examining these pipelines' settlements or settlement workpapers that these pipelines also received future-related relief through their settlements. The Commission concludes that it is reasonable to use the $28 billion estimate of future relief and that AGD has adequate information from the aggregated data to make its case too the court of appeals.

Last, the Commission believes that its release of the aggregated data and analysis of that data comports with the *AGA* decision.

The Commission will request leave of the court to issue this order.

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51. See n.36, *supra*.

52. See n.36, *supra*.

53. *E.g.*, Texas Gas Transmission Corporation, Colorado Interstate Gas Company, Questar Pipeline Company, Sea Robin Pipeline Company, West Texas Gathering Company, and Valero Interstate Transmission Company.

The Commission orders:

AGD's January 30, 1990 motion is denied.
By the Commission:

(SEAL)

/s/ LOIS D. CASHELL,
Lois D. Cashell,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ANR PIPELINE COMPANY

DOCKET NO. RP89-45-000

PROTECTIVE ORDER

(Issued January 30, 1989)

This Protective Order is a device to facilitate and expedite the handling of discovery in this proceeding. It reflects the manner in which "Protected Materials," as that term is defined herein, are to be treated. This Order is not intended to constitute a final resolution of the merits concerning the confidentiality of any of the Protected Material nor of any objection to the propriety or scope of a data request. This Order also does not limit in any way the rights of ANR Pipeline Company ("ANR") under Section 388.112 of the Commission's Regulations to request confidential treatment of any information filed with the Commission in this proceeding.

1. All documents and information furnished subject to the terms of this order hereinafter shall be referred to as "Protected Materials." Protected Material shall include materials provided by ANR in response to informational requests, which materials contain sensitive, commercial, proprietary information and are designated by ANR as "Protective Materials," as well as any other documents or information supplied by or obtained from ANR that by subsequent designation by ANR, order or agreement in this proceeding are made subject to the terms of this Protective Order. Protected Materials shall be deemed to include additional copies and notes and information derived from Protected Materials.

2. Protected Materials shall not include any information or document contained in the public files of the Federal Energy Regulatory Commission ("FERC" or "Commission") or any other federal or state agency. Protected Materials also shall not include documents or information which at, or prior to, commencement of these proceedings, are or were, public knowledge, or which become public knowledge as a result of publication or disclosure by ANR.

3. Protected materials will be made available only to a "reviewing party". As used in this Protective Order, the term "reviewing party" shall include the party propounding the data request the response to which is deemed Protected Materials, and such other party as the Presiding Administrative Law Judge ("Presiding Judge") shall, by order, make a reviewing party for purposes of reviewing Protected Materials, and who shall be subject to the provisions of this Protective Order. However, a reviewing party must be one of the following:

(a) a sales customer of ANR;

(b) a State regulatory agency which has jurisdiction over the rates and charges of any customer described in subparagraph (a) or a state consumer protection agency which has jurisdiction to represent the interests of ratepayers residing in a state in which gas is sold by ANR.

Absent express authorization from the Presiding Judge, for purposes of reviewing evidence submitted in this proceeding, a reviewing party may not be a producer of natural gas, a marketer or a broker of natural gas or an interstate or intrastate natural gas pipeline.

4. A reviewing party shall be permitted access to Protected Materials only through its "authorized representatives." Authorized representatives of a reviewing party include its counsel of record in this proceeding and associated attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by the reviewing party and directly engaged in these proceedings.

In order to be qualified as such an authorized representative, the individual may not be employed or retained in a capacity in which such individual is currently engaged in actively negotiating take-or-pay buydowns, buyouts or disputes with or on behalf of a producer or producers, nor in actively and knowingly negotiating for the purchase of gas that is presently or within the past two years, has been dedicated too an interstate pipeline, except as otherwise specifically agreed to between ANR and the reviewing party. ANR's agreement may not be unreasonably withheld.

5. Prior to receiving a copy of, or inspecting any protected materials, each authorized representative shall first agree to the following certification, indicating that agreement by signing a copy of such certificate:

> I certify my understanding that the protected materials are provided to me pursuant to the terms and restrictions of the Protective Order in Docket No. RP89-45-000, that I have been given a copy of it and have read the Protective Order and that I agree to be bound by it. I understand that the contents of the protected materials, and any notes, memoranda, or any other forms of information regarding or derived from the protected materials, shall not be disclosed to anyone other than in accordance

with the Protective Order and shall be used only for the purposes of the proceedings in Docket No. RP89-45-000. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

Each executed certificate shall identify the authorized representative, his or her firm or affiliation and the date of execution. A copy of each written certification shall be provided to counsel for ANR and to the Presiding Judge's clerk, promptly upon execution. Any authorized representative may disclose Protected Materials to any other person who is an authorized representative or is qualified to be an authorized representative, provided that, if the person to whom disclosure is to be made has not previously executed and delivered a written certification to ANR's counsel and the Presiding Judge's clerk written certification shall be executed prior to any disclosure and thereupon promptly delivered. In the event that any person to whom such Protected Materials are disclosed ceases to be engaged in this proceeding, access to such materials by such person shall be terminated immediately and such person shall promptly return any information related to protected materials in his or her possession to another authorized representative of the reviewing party, and if there shall be no such authorized representative, then such person shall treat such information and Protected Materials in the manner set forth hereinafter, as if the proceedings herein had been concluded. Any person who has agreed to the foregoing certification shall continue to be bound by the provisions of this Protective Order even if no longer so engaged.

6. Protected Materials shall be made available for inspection at two locations: the offices of ANR maintained

at 500 Renaissance Center, Detroit, Michigan 48243, and at ANR's Washington, D.C. Office, 1899 L St., N.W., Suite 501, Washington, D.C. 20036. Inspection shall be conducted only by authorized representatives by appointment during normal business hours (9:30 a.m. to 5:00 p.m.) Monday through Friday, except for holidays which are observed at such offices. A facility for inspection of documents shall be available at each location until the close of the evidentiary record in proceedings herein and access to such facility shall not be unreasonably withheld. Counsel for ANR who are engaged in these proceedings shall be contacted to obtain access to Protected Materials. Reviewing parties may take notes to derive information from the Protected Materials provided.

7. Protected Materials may be reviewed only during the "reviewing period," which shall commence upon issuance of this Protective Order, and continue until the conclusion of these proceedings. As used in this paragraph, "conclusion of these proceedings" refers to the exhaustion of available appeals, or the running of the time for the making of such appeals, as provided by applicable law.

8. All Protected Materials as well as the reviewing parties' notes or other information regarding, or derived therefrom, are to be treated confidentially by the reviewing party except as permitted and provided in this Protective Order and are made available to the reviewing parties solely for the purposes of these proceedings. Protected Materials and information derived therefrom or describing the same shall not be placed in the public or general files of the reviewing parties except in accordance with provisions of this Protective Order. A reviewing party must take all reasonable precautions to en-

sure that Protected Materials, including handwritten notes and analyses made therefrom, are not viewed or taken by any person other than an authorized representative of the reviewing party.

9. If a reviewing party tenders for filing any written testimony, exhibit, brief or other submission that includes, incorporates, or refers to Protected Materials, all portions thereof referring to such materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS" and shall be filed undelivered and served under seal only upon counsel for such reviewing parties as are authorized to examine and inspect such materials. Counsel for ANR shall provide to the Presiding Judge's clerk and to all parties who request the same a list of those counsel for authorized representatives who are entitled to receive such material. Counsel are admonished too take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

10. If any reviewing party desires to include, utilize, or refer to any Protected Materials in testimony or exhibits during the hearing in such a manner that might require disclosure of such material, such party shall first notify both counsel for ANR and the Presiding Judge of such desire, identifying with particularity each of the Protected Materials and the proposed manner of its use. Unless objection to disclosure of such materials is waived by ANR, or unless the materials are no longer deemed to be subject to the provisions of this Order after completion of examination of witnesses concerning such materials, all references to such Protected Materials, in-

cluding all objections and arguments related thereto shall be conducted *in camera* closed to all parties except to the reviewing parties as described in Paragraph 3, hereof. That portion of the hearing transcript which refers to such material shall be sealed and subject to this Protective order. All Protected Materials which ultimately may be admitted into evidence shall be filed in sealed, confidential envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order.

11. All Protected Materials filed with the Commission, the Presiding Judge, any United States court or any state court, or any other judicial or administrative body in support of or as a part of a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order.

12. The terms of this Protective Order, under which members of the Commission trial staff are reviewing representatives, and under which certain Protected Materials may be filed at the Commission, are subject to the Freedom of Information Act (FOIA) and Commission rules and directives implementing that Act, including but not limited to, Part 388 of the Commission's Rules of Practice and Procedure. With regard to Protected Materials filed with the Commission, provided to the Presiding Judge, or submitted to the Commission Staff in this case, the notification procedures of Sections 388.112(d), (e) and (f) of the Commission's regulations will be followed before making any such Protected Materials public under a FOIA request.

13. Each party governed by this Protective order has the right to seek changes in it as appropriate from the Presiding Judge, the Commission, or the courts. In addition, the Presiding Judge may change this order upon determination that the change is appropriate in the interests of justice or necessary for the orderly conduct of the proceedings.

14. In the event that the Presiding Judge at any time in the course of this proceeding finds *sua sponte* that all or part of the Protected Materials are not confidential, those materials nevertheless shall continue to be subject to the protection afforded by this order from the date of issuance of the Presiding Judge's decision until 5 days after the date of issuance of any Commission order denying an appeal filed pursuant to Rule 715 of the Commission's Rules of Practice and Procedure, if a motion to the Presiding Judge to permit appeal is made by ANR pursuant to Rule 715(b) (1) and is granted, or if denied, if ANR appeals such denial to the Motions Commissioner pursuant to Rule 715(c). Neither ANR, nor any reviewing party, waives its right to seek additional administrative or judicial remedies in the event of the Commission's denial of any appeal, or in the event the Motions Commissioner does not permit appeal to the Commission.

15. In the event that a reviewing party wishes to disclose Protected Material to any person to whom disclosure is not authorized by this Protective Order, or wishes to object too the designation of certain information or material as Protected Material, such reviewing party shall first serve written notice of such proposed disclosure or objection upon counsel for ANR and the Presiding Judge identifying with particularity each of such Pro-

tected Materials. Negotiations shall then be undertaken by counsel for ANR and the reviewing party in order to resolve disputes as to such disclosure or the validity of the claim to protection. Where these negotiations produce agreement, such agreement shall be filed with the Presiding Judge, and the other reviewing parties authorized to examine the same may make use of the Protected Materials in the same manner provided that they enter into the same agreement with ANR.

If ANR declines to acquiesce in such disclosure, or to agree that the information should not be classified as Protected Materials, it shall notify the reviewing party in writing of that position and the reasons therefore within 5 days of receipt of the reviewing party's written notice. Within 5 days of receipt of ANR's position letter, a reviewing party may make application under seal to the Presiding Judge either for modification of this Protective Order, a determination that the material in issue should not be considered Protected Material, or for such other ruling as is appropriate. The reviewing party shall serve counsel for ANR with a copy of such application. Unless otherwise ordered, ANR shall have 5 days after receipt of such application to file under seal a response to the application. Each such response shall be served on the reviewing party who filed this application. Nothing contained herein shall be construed to limit the authority of the Presiding Judge to modify the times provided herein during the pendency of evidentiary hearings or otherwise.

In the event the Presiding Judge finds that the materials at issue should not be considered Protected Materials, such materials nevertheless shall be subject to the protections afforded by this Protective Order until 5 days

after the date of issuance of any Commission order denying an appeal filed pursuant to Rule 715 of the Commission's Rules of Practice and Procedure by the Presiding Judge to protest appeal is made by ANR pursuant to Rule 715(b) (1) and is granted, or if denied, if ANR appeals such denial to the Motions Commissioner pursuant to Rule 715(c). For purposes of this order, Commission inaction within the 15-day periods prescribed in Rule 715(d) shall be construed as an order denying interlocutory appeal. Neither ANR, nor any other reviewing party, waives any rights to seek additional administrative or judicial remedies after action by the Commission on any appeal, or in the event the Motions Commissioner does not permit appeal.

16. Nothing in this order shall be construed as precluding any participant in these proceedings from objecting to the use of the materials subject to the provisions of this order on grounds other than confidentiality. Nothing in this agreement shall preclude ANR from claiming that Protected Materials which have been produced and which, but for their production, would have been subject to a claim of privilege, have been produced inadvertently and, thus remain privileged despite this production.

17. All notices, applications, responses or other correspondence shall be made in a manner which protects the materials in issue from unauthorized disclosure.

18. Following the conclusion of these proceedings, as that term is defined in paragraph 7, ANR will provide written notice to counsel for reviewing parties advising each reviewing party that it must, no later than 30 days following service of such notice, return to counsel for

ANR all copies of any Protected Materials provided by ANR and all copies reproduced by a reviewing party, and all information relative thereto, and that counsel for each reviewing party must provide to counsel for ANR a verified certification that, to the best of his or her knowledge, information, and belief, all copies of notes, memoranda, and other documents regarding or derived from the Protected Materials have been destroyed.

Nothing in these paragraphs shall prohibit each counsel for a reviewing party from retaining two copies of any brief, application for rehearing, or other pleading, motion of other filed document which refers to Protected Materials provided that any such materials retained by counsel shall remain subject to the provisions of this Protective Order.

Nothing in this order shall be construed as agreement by any party that the protected materials are entitled to confidential treatment.

19. Notwithstanding any provision contained herein to the contrary, this Protective Order shall expire two years after the conclusion of these proceedings, as that term is defined in Paragraph 7.

/s/ BRUCE L. BIRCHMAN
Bruce L. Birchman
Presiding Administrative
Law Judge

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RM87-34-000

Regulation of Natural Gas Pipelines
After Partial Wellhead Decontrol

JOINT COMMENTS OF INDICATED PRODUCERS

The undersigned producers (Producers) file these Comments on Order No. 500, pursuant to the notice provisions contained in such Order. Each Producer reserves the right to file Supplemental Comments.

. . . .

F. Credits Should Not Be Allowed When The Producer Sells Gas To A Pipeline At The Wellhead.

Where the producer sells gas to a pipeline at the wellhead and the pipeline transports the gas on an open-access pipeline, the producer should not be required to offer credits to the transporting pipeline. Gas sold to a pipeline for system supply should not be subject to a credit.

G. The Pipelines Should Not Be Required To Report All "Cash And Non-Cash" Consideration In Producer/Pipeline Settlements; Data Which Is Reported Should Be Kept Confidential.

Producers have serious concerns regarding the disclosure requirements contained in Order No. 500. In order to support recovery of amounts actually paid through the new flow-through mechanism, the Order states that the pipeline "must disclose and describe all consideration,

both cash and non-cash, given to producers in exchange for take-or-pay relief."[115] No restrictions or limitations on usage or disclosure are specifically provided.

Producers understand the need for pipelines to provide data to support the amount of settlement costs for which recovery is sought. However, blanket, open disclosure on the public record of all terms of each individual settlement is neither necessary nor advisable, and is likely to either discourage settlements or to increase their costs. This is particularly true with regard to disclosure of non-cash consideration, which can be difficult or impossible to quantify *and for which recovery is not being sought.*

Nothing is more confidential for a business entity than its bottom-line negotiation position. Current take-or-pay settlement negotiations between producers and pipelines are among the most complex, difficult, high-stakes negotiations this industry has ever seen. Public disclosure of precisely what a producer is willing to accept, or a pipeline is willing to give up, would be tremendously destructive to this ongoing process.

It may be argued that disclosure is only being required after a deal is concluded. However, it is quite likely that many settlements will be contingent on some further condition, and may have to be revisited at a later time. More significantly, each party to a particular settlement is bound to have numerous other negotiations still underway. Negotiating when the other side has seen your hole card is an exercise in futility.

The obvious, counterproductive result is that producers and pipelines will be reluctant to enter negotiations lead-

115. Order No. 500 at 84; Section 2.104(c).

ing to a settlement which, by Commission regulation, must become public knowledge. The alternative to a producer/pipeline settlement is lengthy and expensive litigation in the courts. While producers have generally prevailed in such litigation so far, having to resort to litigation is disruptive to good business relationships. Another equally counterproductive result will be that costs of settlements will increase as each new disclosure of a particular settlement agreement becomes the floor-bargaining position for the next negotiation. Requiring full disclosure may also result in revealing a producer's overall marketing strategy to its competitors, which could be anti-competitive, and in conflict with federal antitrust policies. Disclosure of a producer's marketing strategy could have a substantial impact upon both supply availability and price in certain markets.

For these reasons, Producers urge that absolutely minimum disclosure, and maximum protection of data, be made a central part of Order No. 500. Specifically, the Commission should adopt the following principles relating to settlement data:

(i) Only aggregate data need be reported by pipelines. What is at issue is the total amount being passed through, not the allocation of payments to various producers. Evens where prudency is being questioned, it is the total amount, not the specifics, that is of interest. If necessary, details of individual payments could be disclosed to appropriate staff members in order to verify amounts, but should not be released to the public or other intervenors.

(ii) Even as to aggregate data, disclosure should be limited to the maximum extent feasible by protective orders and conditions. The Commission has

established Regulations and precedents regarding the need to keep take-or-pay settlements confidential, which should be followed here.[116]

(iii) Producers object to the requirement that "non-cash" consideration must be disclosed. Pipelines will not be attempting to flow through non-cash consideration because by its nature it is probably not quantifiable. And where there is no attempt to pass these costs through, disclosure serves neither of the two possible purposes for requiring it: (a) verification of amount to be passed through or (b) review of prudency of amount to be passed through. On the other hand, disclosure of non-cash consideration is even more likely to discourage settlements, raise settlement floors, and reveal marketing strategies, than is disclosure of cash terms. Non-cash consideration is a powerful tool in encouraging settlements, because of its tremendous flexibility and because it can easily represent little or no cost to the pipeline. Accordingly, its use should be encouraged, not discouraged or eliminated by requiring disclosure which serves no purpose. The Commission should not require disclosure of non-cash consideration which is *not* sought to be recovered through the new non-PGA filing.

VIII. CONCLUSION

The crediting mechanism should be re-examined in depth by the Commission. It is Producers' belief that after such thorough re-examination, the Commission will conclude, as it did in Order No. 436, that requiring credits against take-or-pay obligations in impermissibly exceeds

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116. *E.g.*, "Rules of Discovery for Trial-Type Proceedings, Docket No. RM83-41-000 (March 2, 1987), Order No. 466, 18 C.F.R. §§ 385.401 and 385.411; Transcontinental Gas Pipe Line Corporation, *et al.*, Docket No. RP 87-7-000, "Order Granting Interlocutory Appeals," (March 12, 1987).

the limits of its jurisdiction in some aspects, is unduly discriminatory, and will seriously interfere with the operation of the open-access transportation system. The take-or-pay crediting mechanism should not be adopted. Should the Commission determine to a crediting mechanism in some form, basic changes in the crediting mechanism in Order No. 500 will be required, as detailed above.

The Commission should repeat its Order No. 436 finding, after reviewing new data and the Comments filed herein, that no attempt to abrogate contracts or contract provisions subject to its NGA jurisdiction should be made, as such action would be counterproductive, and would be inequitable in its consequences.

Respectfully submitted,

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October 13, 1987

United States of America
Federal Energy Regulatory Commission

Regulation of Natural Gas Pipelines
After Partial Wellhead Decontrol

Docket No. RN87-34-000

Response of Exxon Corporation
To Take-or-Pay Data Request

In Order No. 500, the Federal Energy Regulatory Commission ("Commission") directed certain pipelines to respond to a take-or-pay data request in order to analyze fully how effective and appropriate action under Section 5 would be in mitigating pipeline take-or-pay problems. Producers were requested to file similar data. In accordance with the Commission's request, Exxon Corporation ("Exxon") respectfully submits this response in order to inform the Commission of the progress made by Exxon and its interstate pipeline purchasers with regard to take-or-pay.

I.

Exxon has been quite active for a number of years in renegotiating gas sales contracts too resolve accrued and prospective take-or-pay exposure, and amending prices and other terms in order to mitigate the future recurrence of such items. Exxon and its pipeline customers on the whole have been successful in achieving broad resolutions on these matters through the process of private negotiations. Such negotiations have included a range of solutions including the release of gas, the transportation of gas, cash consideration, amendment of take and/or pricing terms and similar issues in addition too the settlement

of outstanding take-or-pay claims. Thus the eventual results of such trades will encompass the future effects of contract amendments in addition to the current and past effects of reducing take-or-pay exposure. Therefore, the composite past, present, and future worth of the pipelines' reduced contractual obligations to Exxon as a result of these renegotiations and settlements will be larger than just the value of the take-or-pay claims which were resolved.

In terms of magnitude, $1.6 billion of accrued take-or-pay claims by Exxon have been resolved through negotiated settlements. This figure includes a minor component (about 7%) associated with settlements not yet consummated, but where discussions are sufficiently advanced to the point of having reached agreement in principal. By amending the take or other provisions of the underlying contracts, additional potential claims were and will be avoided by the pipelines, both through year-end 1987 and into the future. Furthermore, by negotiating releases of gas from these contracts, the pipelines avoided even more potential take-or-pay exposure. And, additive to the benefits directly related to take-or-pay is additional value achieved by the pipelines resulting from pricing amendments which were an element in certain of these negotiated settlements. Again, such price amendments generated benefits achieved too date and which will continue to be achieved into the future.

Despite the extensive efforts put forth to date by Exxon to achieve resolution on these issues, we do have an outstanding, as yet unresolved take-or-pay balance. This balance is on the order of $300 million, after giving consideration to cases where agreement in principle has been reached in our discussions with pipelines. We

are involved in and will continue efforts to achieve negotiated settlements on these items as well. This is not a trivial sum, and we do not suggest that it be ignored. Rather, the Commission should continue to encourage the parties to resolve these matters through voluntary negotiations. In that regard, the Commission must take cognizance of what has been accomplished through private negotiations, without government intervention, and in the absence of a clearly stated policy by the regulatory agency on the recovery of prudently incurred costs by the pipelines. As the above figures demonstrate, Exxon has already resolved about 85% of its "take-or-pay problem" with its interstate pipeline purchasers. This settlement figure is comparable to industry-wide results which have been reported elsewhere.

The record shows that take-or-pay has been and can be resolved by the parties. There is strong evidence to suggest that the incidence of future take-or-pay exposure will be mitigated by the combined effects of past and current contract renegotiations, a better balance between supply and demand, and the adoption of enlightened regulatory policies for abandonment, passthrough of prudently incurred costs, and non-discriminatory transportation. Thus, the Commission should be even more confident in the ability of private businessmen to reach accords which will continue to make take-or-pay manageable in the future. The Commission should not promulgate regulations, such as the crediting procedures of Order No. 500, that undermine the negotiation process.

II.

Many have called for the Commission to exercise its authority under Section 5 of the Natural Gas Act to

modify take-or-pay provisions in jurisdictional contracts. Because the Commission's authority under Section 5 operates prospectively, critical to the Commission's decision whether to exercise its authority is a determination of the future of the "take-or-pay problem." In the past, take-or-pay has been manageable through voluntary contract renegotiations, witness the results achieved by Exxon as mentioned above and by industry as a whole.[1]

Indications are that the level of take-or-pay accruals will decrease in the future. To begin with, supply and demand is expected to come into better balance. Negotiated contract restructuring that provides for market responsive pricing and reduced take requirements should reduce accruals. Exxon and others have filed for permanent abandonment of substantial volumes of jurisdictional gas that would reduce deliverability committed to the pipelines and hence take-or-pay requirements. In addition, the Commission has established in Order No. 500 a passthrough mechanism on "buy out" and "buy down" costs which should facilitate further the voluntary settlement of take-or-pay claims.

An INGAA study[2] forecasts the take-or-pay liability accruing in 1987 to be $4.9 billion, down 20% from take-or-pay liability accrued in 1986. Exxon's take-or-pay accruals have averaged more than $500 million per year during the past few years. As a result of the contract

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1. *See, for example, Comments of Natural Gas Supply Association /PA/ et al.*, Appendix D, Docket No. RM87-34-000.

2. *See* Interstate Natural Gas Association of America, *The Unresolved Take-or-Pay Problem: Year-End 1986 Exposure and Costs*, July, 1987.

restructuring discussed above, we project 1987 accruals on the order of $100 million (primarily with pipelines where settlements/renegotiations have yet to be realized),

III.

and expect 1989 accruals, if any, will be less than $100 million. This is strong evidence that the expected future diminishment of take-or-pay accruals has already begun.

The question before the Commission is whether the "take-or-pay problem" is of such overriding public interest to warrant taking apart freely negotiated private contractual terms and replacing them with Commission-determined rights and obligations. The evidence submitted herewith shows that as to Exxon's contracts, the "problem" is not of such magnitude. As detailed above and in the NGSA study, take-or-pay liabilities have been resolved in the past and can be resolved in the future.[3]

It is time to recognize that government intervention in the natural gas market cannot succeed. Wellhead price regulations of the interstate market has failed. Any regulation of the quantity provisions of contracts will likewise fail. Commission-imposed take-or-pay limits in interstate contracts will bring about reduced exploration and drilling, uncertainty of supply, inefficient allocation of resources, and a growing frustration of producer and user alike. Just as wellhead price regulation drove up the take provisions of interstate pipeline contracts, so may regulation of contract take provisions drive up the price of gas to the interstate market. If interstate pipelines are not allowed to offer take provisions that are competitive with intrastate pipelines and other buyers, they may be

3. It is unclear at this time the extent to which uncertainties of Order No. 500 crediting will impede future take-or-pay settlements.

forced to offer higher prices in order to secure needed supplies. Thus, Commission established limits on contractual take provisions could resurrect the dual market that Congress clearly meant to eliminate by passage of the NGPA and directly detract from the concept of a national market.

Likewise, the direct intervention of the Commission into the marketplace via the Order No. 500 crediting mechanism unduly burdens a producer's participation in the interstate market. The crediting mechanism will make it more difficult and more expensive to move gas to the interstate market because its transportation may create financial debits to producers in the form of abrogated take-or-pay contracts elsewhere. Thus crediting not only reduces the funds available for development activity but limits the potential for finding a market for the production when development does take place. Both impacts will negatively affect availability of gas supply.

Congress in the NGPA turned to the market for the country's natural gas needs. The Commission should not abandon market solutions and the ability of private parties to resolve their differences without governmental interference.

IV.

As the above information indicates, there are no overriding public interest considerations that warrant governmental interference with the contractural rights of producers and pipelines. The marketplace is dealing with the "problem" through the private renegotiation of take requirements and the resolution of accrued take-or-pay

balances. The "problem" is manageable, and further more is limited to a relatively small number of pipeline companies.[4]

The Commission has directed pipelines to file information in response to a data request prepared by the Commission. Exxon is concerned that data submitted accurately portray the current dimensions of the "take-or-pay problem." To begin with, the data request would not appear to take into consideration the resolution of take-or-pay liabilities after June 30, 1987. Exxon has entered into settlement agreements with pipelines resolving over $500 million in take-or-pay liabilities since June 30, 1987. Exxon has also reached agreement in principle on the resolution of over $100 million in take-or-pay liability and may resolve further liabilities by year end. Attachment 1 to the separate confidential filing being made concurrent herewith shows Exxon's outstanding take-or-pay claims by pipelines estimated at October 31, 1987. The attachment also shows Exxon's take-or-pay claims as of June 30, 1987. As the Attachment and the above clearly show, a June 30, 1987, cut-off date does not accurately reflect the current magnitude of unresolved take-or-pay claims.

Secondly, the requested format seems to be flawed in several respects. For example, Schedule No. 4 "Take-or-Pay History" requires the pipeline to provide the physical annual deliverability of the gas covered by the contract and the annual take-or-pay obligation as a percentage of deliverability. The pipeline subtracts from this quantity the quantity of gas actually purchased and the quantity of gas released for which a take-or-pay credit was re-

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4. *See*, Comments of the Natural Gas Supply Association, *et al.*, Appendix D, Docket No. RM87-34-000.

ceived. This then determines the "take-or-pay quantity obligation. Determining the pipeline's take-or-pay quantity obligation, however, is not that simple. There are any number of other adjustments that are needed to determine the pipeline's "take-or-pay" obligations that do not appear to be reflected in the Commission's request. Adjustments for quantities not taken but excused as a result of the producer's failure to deliver are two examples of the adjustments that must be considered under most contracts to get an accurate picture of the pipeline's outstanding "take-or-pay" obligation.

Finally, Exxon is concerned that the accuracy of the Commission's data base is dependent upon the subjective interpretation of the contracts and data request. The pipelines have every incentive to interpret the contracts and the data request in a manner designed to overstate their take-or-pay liabilities, assuming the Commission treats such information as confidential so that it will not be held against them. Indeed, the Commission may have unintentionally steered the pipelines in that direction with data request instructions using such phrases as "take-or-pay exposure."

Sound public policy must be based on objective, verifiable facts. Pipelines are not disinterested parties. It should come as no surprise that there are disputes between producers and pipelines regarding take-or-pay liabilities. It is imperative that producers be permitted to verify the accuracy of the pipeline submissions. The Commission should provide each producer with the pipeline submissions applicable to its contracts so that the accuracy of those submissions can be cross checked with producer records.

Toward this end of providing the Commission with information to be used to cross-check pipeline submissions, Exxon is submitting under separate cover, pursuant to the confidentiality procedures of 18 C.F.R. Section 388.110 an attachment showing Exxon's aggregate take-or-pay claims against certain pipelines. In the same confidential filing Exxon is also submitting contract specific information on 24 of its contracts that covered over 90% of Exxon's take-or-pay claims in order to assist the Commission in auditing the material submitted by Exxon's interstate pipeline purchasers. This contract specific information is proprietary and contains commercially sensitive business and financial records that are exempt from the public disclosure requirements of the Freedom of Information Act. Exxon does not object to contract specific information being made available to the pipeline with which the contract applies as long as Exxon has a right to examine and verify the filing of that pipeline which is applicable to its contracts with Exxon. However, disclosure to competitors, pipelines or others through the public record could result in competitive injury to Exxon.

There are substantial due process and Administrative Procedure Act concerns about the actions the Commission has already taken regarding take-or-pay crediting in Order No. 500. These concerns are also present should the Commission proceed under Section 5 of the Natural Gas Act based on material facts not available to producers. Substantial prejudice will result unless producers have an opportunity to rebut such information and provide meaningful comment.

In sum, the Commission has asked for a subjective estimate of pipeline take-or-pay liability which may result

in unusable data. The data requested do not reflect significant reductions in take-or-pay liabilities which have occurred since June 30, 1987. Finally, there are insufficient safeguards against pipeline overestimates of take-or-pay liability.

V.

In Order No. 436, the Commission refused to act under Section 5 of the Natural Gas Act to modify take-or-pay provisions in pipeline/producer contracts. The current data confirm the Commission's original conclusion that the marketplace is resolving the "problem" and that there is not justification for interfering with the private contractual relationship of the parties.

Respectfully submitted,

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Contains Confidential Information

ATTACHMENT 1

EXXON ESTIMATED TAKE-OR-PAY CLAIMS WITH INTERSTATE PIPELINES (MILLION $)

Pipeline	Outstanding Take-or-Pay (Thru 6/30/87)	Outstanding Take-or-Pay (Thru 10/31/87)
ANR	0.9	0.9
ARKLA	2.4	3.6
COLORADO	2.6	3.8
COLUMBIA	1.4	19.4
EL PASO	23.4	36.5
NATURAL GAS	9.3	14.5
NORTHERN	129.6	129.6
PANHANDLE EASTERN	0.1	0.2
PACIFIC OFFSHORE	15.1	0.0
SEA ROBIN	17.6	37.6
SOUTHERN	15.0	15.0
TENNESSEE	45.0	45.0
TRUNKLINE	429.6	0.0
TRANSCO	135.0	0.0
UNITED	108.2	108.2
	955.4	415.5[1]

1. When including the effects of negotiations which have advanced to the point of reaching agreement in principle, the estimated current balance is about $300 million.

(2)

No. 90-1401

Supreme Court, U.S.
FILED
APR 4 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

ANR PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether the District Court and Court of Appeals erred in requiring Petitioner to produce documents responsive to Respondent's discovery requests where Petitioner's claim of privilege was based upon the Federal Energy Regulatory Commission's decision to exempt the documents from mandatory public disclosure under the Freedom of Information Act.

LIST OF PARTIES

The parties to the proceedings below were the petitioner ANR Pipeline Company, respondent United States District Court for the Southern District of Texas and real party in interest Exxon Corporation.

Exxon Corporation has the following subsidiary corporations which it does not wholly own:

Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Associated Oil Company (Kyneton) Pty. Ltd.
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
BEB Erdgas und Erdoel GmbH, Hannover
BRIGITTA Erdgas und Erdoel GmbH, Hannover
BT Asia Securities Limited
Beaverhill Resources Limited
Byron Creek Collieries (1983) Limited
Canadian Reserve Oil & Gas Ltd.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Clermont Coal Mines Limited
Comcor Chemicals Limited
Commercial Polymers Pty. Ltd.
Compagnie d'Etancheite Africaine en Cote d'Ivoire S.S.
Compania Minera Disputada de Las Condes S.A.
Comptoir Oyonnaxien des Combustibles (C.O.C.)
Devon Estates Limited
E S F Limited
ERC Malaysia Inc.
Elwerath Erdoel und Erdgas AG
Elwerath Erdgas und Erdoel GmbH, Hannover
Esso Chemical Alberta Limited
Esso Energie G.I.E.

LIST OF PARTIES – Continued

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Esso Exploration and Production Ireland Limited
Esso Lub'Services
Esso OIL Tankstellen Gesellschaft m.b.H.
Esso Malaysia Berhad
Esso of Canada Limited
Esso (Overseas) Pension Trust Limited
Esso Portuguesa, S.A.
Esso Resources Canada (an Alberta limited partnership)
Esso Resources Canada Limited
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Limited
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise
Esso Standard Algerie S.A.
Esso Standard Tunisie S.A.
Esso Technologies et Services (E.T.S.)
Etablissements Cloarec
Exxon Chemical Pakistan Limited
Exxon de Colombia S.A.
Exxon Supply Company
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.V.)
Groupement Petrolier du Finistere G.I.E.
Heinrich Schneider Spedition GmbH
Hong Kong Pumped Storage Development Company, Limited
Kai Tak Refuellers Company Limited

LIST OF PARTIES – Continued

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Imperial Pipe Liine Company, Limited, The
Japan Butyl Company Limited
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Eastern Gas Terminal
Kowloon Electricity Supply Company Limited
Maple Leaf Petroleum Limited
Mainline Pipelines Limited
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
Metro Fuel Co. Ltd.
Mr. Lube Canada Inc.
Mytex Polymers Incorporated
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Nisku Products Pipe Line Company Limited
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Noroxo
107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
160440 Canada Limited
160837 Canada Limited
165899 Canada Limited
165548 Canada Limited
165549 Canada Limited
165550 Canada Limited
168211 Canada Limited
OSLO Alberta Limited
Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.
P.A.C. S.A.R.L. (Pinson-Allegret-Causse)
P. T. Stanvac Indonesia
Peninsula Electric Power Company Limited
Primaer Oel GmbH

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Smiley Gas Conservation Limited
Sociedad de Inversiones de Aviacion
Societe d'Exploitation & de Developement d'Operations Commerciales
Societe du Caoutchouc Btyl (SOCABU)
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise EXXON CHEMICAL
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petroliers S.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
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363011 Alberta Limited
393193 Alberta Inc.
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TIBA Speditions GmbH
Thai Aliphatics Company Limited
Tonex Company Limited
Winnipeg Pipe Line Company Limited
Worex S.N.C.

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No. 90-1401

In The

Supreme Court of the United States

October Term, 1990

ANR PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Petitioner, ANR Pipeline Company ("ANR"), is seeking review of an interlocutory discovery order entered by Respondent the United States District Court for the Southern District of Texas on June 15, 1990, compelling ANR to produce certain documents to the real party in

interest, Exxon Corporation ("Exxon"). On July 14, 1989 Exxon served its First Set of Interrogatories, Requests for Admission, and Request for Production of Documents on ANR in accordance with Rules 33, 34, and 36 of the Federal Rules of Civil Procedure. (Appendix to Petition for Writ of Certiorari [hereinafter "A.P."] at p. 6a). As a part of the request for production of documents Exxon specifically requested that ANR produce certain documents it filed with the Federal Energy Regulatory Commission ("FERC") in a FERC proceeding. ANR objected to the production of these documents.

On May 16, 1990 Exxon moved to compel the production of these documents. (A.P. 12a). On June 6, 1990 ANR moved the district court for a protective order. The district court granted Exxon's motion to compel on June 15, 1990. (A.P. 1a). On July 15, 1990 ANR moved the district court to reconsider its order. (A.P. 20a). The district court denied ANR's motion for reconsideration on September 11, 1990. (A.P. 3a). ANR petitioned the United States Court of Appeals for the Fifth Circuit for a writ of mandamus on October 10, 1990, and on October 12, 1990 the court of appeals denied ANR's petition for writ of mandamus. (A.P. 1a). ANR petitioned for rehearing on October 26, 1990 and on November 14, 1990 the Fifth Circuit denied ANR's petition for rehearing. (A.P. 5a).

Exxon filed a second motion to compel production of the documents, and on February 27, 1991, the district court granted this motion and ordered ANR to produce the documents within 15 days. ANR filed a motion to stay the district court's order in the Fifth Circuit, and the motion to stay was denied on March 12, 1991. ANR then filed a motion to stay in this Court, and Justice Scalia

denied the motion on March 13, 1991. The 15-day period for production of the documents, as ordered by the district court, expired on March 14, 1991. ANR has begun producing these documents to Exxon. ANR filed its petition for writ of certiorari seeking review of this discovery order on February 12, 1991.

2. STATEMENT OF FACTS

Exxon, a producer of natural gas, and ANR, an interstate gas pipeline, are parties to three gas purchase contracts which form the basis for this litigation. Exxon contends that ANR has failed to comply with various provisions of those contracts including provisions requiring that certain quantities of gas be taken or paid for whether or not taken ("take or pay" provisions). In response ANR claims, *inter alia*, that it is relieved of these obligations as a result of alleged "system-wide" force majeure and that it has not incurred any take or pay liability to Exxon or to numerous other producers from June 1985 to the present.

Exxon instituted suit against ANR and one of its affiliates in the United States District Court for the Southern District of Texas on March 20, 1989. Exxon was aware of filings made by various pipelines with the FERC that directly contradict these pipelines' claims that they have no take or pay liability to Exxon, and Exxon requested copies of similar filings from ANR.

In order to avoid potential objections relating to confidential material requested by both parties in their discovery requests, Exxon and ANR jointly requested the entry of a protective order covering material produced in

the course of discovery. The district court entered this protective order and it continues in force and effect in the case.

REASONS FOR DENYING THE WRIT

1. THE PETITION IS MOOT.

As a result of denial of ANR's motions for stay in the district court, court of appeals, and in this Court through Justice Scalia and ANR's subsequent production of the requested documents, this cause is moot. *See, e.g., C & C Products, Inc. v. Messick,* 700 F.2d 635 (11th Cir. 1983) (holding appeal from order compelling production moot after production pursuant to court order). ANR produced the documents after filing its petition in this Court, and the issues raised in the petition are moot. Therefore consideration of the petition is inappropriate.

2. THE QUESTION PRESENTED BY THIS INTERLOCUTORY PETITION IS NOT APPROPRIATE FOR THIS COURT'S REVIEW.

ANR is seeking interlocutory review of a district court's decision on a discovery motion. This Court has noted that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K. Ry Co.,* 148 U.S. 372, 384 (1893). This case presents no such extraordinary circumstances.

In addition, Exxon strenuously disagrees with ANR's contention that the issues presented here are "of national importance to the natural gas industry." (Petition at p. 2). This petition deals only with Exxon's right to pretrial discovery of certain material and ANR's assertion of alleged privileges against such discovery. As noted by the Court of Appeals for the Second Circuit in reviewing similar claims of privilege, "these cases arose in the course of discovery, where the Rules of Civil Procedure leave much to the judges' discretion." *United States v. Noall*, 587 F.2d 123, 126 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979).

Requiring ANR to continue to produce the material in compliance with the district court's order will not adversely affect the natural gas industry, but will simply allow this case to proceed to its conclusion. The protective order already entered in the case prevents the general dissemination of the requested information. Since review of the material is limited to counsel and parties involved in this litigation, ANR's dire prediction about the effect of the lower court's discovery rulings on the price of gas at the burner tip is unjustified. ANR's invitation to review this discovery dispute should be declined.

3. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS.

There is no conflict between the decision of the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the District of Columbia Circuit. Contrary to ANR's arguments, the Court of Appeals for the District of Columbia did not

address the issues presented here in deciding *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3470-1 (U.S. Nov. 21, 1990) (No. 90-806).

In *American Gas Association*, the court of appeals, in a single footnote, upheld *"the [Federal Energy Regulatory] Commission's* decision to not release the raw data about individual settlements" in its rule making proceeding. *American Gas Association*, 912 F.2d at 1508 n.3 (emphasis added). The court of appeals did not address the issue of whether a *pipeline* is required to produce its filings to a producer in an *unrelated civil action*. In fact, such discovery has been allowed in a number of cases. *Exxon Corp. v. El Paso Natural Gas Co.*, No. MO-88-CA-130 (W.D. Tex. Dec. 28, 1988); *Exxon Corp. v. Transwestern Pipeline Co.*, No. 89-011331 (Dist. Court Harris County, Texas 127th Judicial District, Sharolyn P. Wood); *Transwestern Pipeline Co. v. The Honorable Sharolyn P. Wood*, No. 14-90-00127-CV (Tex. App. – Houston [14th Dist.], Mar. 22, 1990), *reh'g denied* (April 19, 1990) (orig. proceeding); *Transwestern Pipeline Co. v. The Honorable Sharolyn P. Wood*, 34 Tex. Sup. Ct. J. 167 (Dec. 19, 1990) (orig. proceeding); *Transwestern Pipeline Co. v. The Honorable Sharolyn P. Wood*, No. 14-91-00003-CV (Tex. App. – Houston [14th Dist.], Jan. 28, 1991) (orig. proceeding).

ANR's attempt to create a conflict between courts of appeals ignores the statutory and regulatory treatment accorded to ANR's filings with the FERC. ANR was allowed to request protection from mandatory public disclosure of information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. This procedure for exemption from mandatory disclosure under the FOIA does not

purport to create any privilege against discovery under the Federal Rules of Civil Procedure. As 18 CFR § 388.112 states:

> (a) *Scope.* Any person submitting a document to the commission may request privileged treatment by claiming that some or all of the information contained in a particular document is *exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552,* and should otherwise be withheld from public disclosure.
>
> * * *
>
> (c) . . . By placing documents in a nonpublic file, the Commission is not making a determination on any claim for privilege. (emphasis added.)

Thus, ANR confuses a request that a document be protected from *mandatory* disclosure under the FOIA with a substantive privilege against such disclosure in a civil suit in federal court.

Exemption from disclosure under the FOIA does not demonstrate or create a privilege for purposes of discovery under the Federal Rules of Civil Procedure. *Kerr v. United States Dist. Ct.*, 511 F.2d 192, 197-8 (9th Cir. 1975), *aff'd on other grounds*, 426 U.S. 394 (1976) (exceptions to disclosure under the FOIA were not intended to create evidentiary privileges for civil discovery); *Pleasant Hill Bank v. United States*, 58 F.R.D. 97 (W.D. Mo. 1973). Indeed the Court of Appeals for the District of Columbia Circuit has recognized that exceptions to mandatory disclosure under the FOIA are not privileges from production under the Federal Rules of Civil Procedure. *Association for Women in Science v. Califano*, 566 F.2d 339, 342 (D.C. Cir. 1977) (holding "[t]he FOIA neither contracts nor expands

existing privileges, nor does it create any new privileges").

ANR's claim to a privilege from discovery under the Federal Rules of Civil Procedure based on the FERC's treatment of filings under the FOIA is without merit and there is no conflict on this issue between the courts of appeal.

4. ANR HAS NOT ESTABLISHED ANY PRIVILEGE PROHIBITING DISCLOSURE OF THE DOCUMENTS.

ANR also attempts to validate its refusal to produce responsive documents by claiming a common law privilege against disclosing "confidential reports" or "self-critical analyses." (Petition at p. 14).[1] Neither "privilege" is applicable.

A. The confidential reports privilege is inapplicable.

ANR's cursory treatment of this argument is telling evidence of the argument's weakness. The confidential reports privilege applies only where discovery of material is sought from the government and protected by a

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[1] ANR's citation to federal cases dealing with federal common law of privilege is inappropriate in this case. This is a diversity case in which no federal law issue has been raised. (Petition at p. 6, n.3). Therefore the law applicable to privileges "shall be determined in accordance with state law." Rule 501, Federal Rules of Evidence. ANR has cited no Texas authority supporting its claim to privilege and this is a sufficient and independent reason for denying the writ.

statutory privilege. ANR fails both parts of this test. First, in order for the privilege to apply the discovery must be directed toward the United States. *Association for Women in Science v. Califano*, 566 F.2d 339, 343 (D.C. Cir. 1977) (holding privilege "unique to" United States). Because Exxon did not seek this discovery from the government, the privilege is not properly invoked. Second, the privilege "must be statutorily based." *Association for Women in Science*, 566 F.2d at 344. ANR has not pointed to any statute upon which its claim is based, and FERC rules dealing with exemption from mandatory disclosure under the FOIA do not create such a privilege. *Association for Women in Science*, 566 F.2d at 342. Therefore ANR is unable to properly assert the confidential reports privilege.

B. The novel self-critical privilege is unnecessary and inapplicable.

(i) This Court should not create a self-critical analysis privilege.

The "self-critical analysis" privilege has never been recognized by this Court. Nor is the privilege generally recognized among lower federal courts. *See, Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977) (privilege of critical self analysis is "largely undefined and generally unrecognized"); *Noall*, 587 F.2d at 126-7 (declining to recognize privilege in nondiscovery context). Recognition of such a privilege also runs afoul of the general rule that "[m]utual knowledge of all relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). This is particularly true with respect to the creation of novel privileges. As this

Court has stated, privileges "are not lightly created, nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Any common law privilege that withholds this information from the discovery process as well as the trier of fact must have overwhelming countervailing benefits. But the purported benefits here would be of dubious value.

Primary among the benefits supposedly conferred by recognition of the privilege is "to make the self-evaluation process more effective by creating an effective incentive structure for candid and unconstrained self-evaluation." *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 218 (D. Mass. 1980). Therefore the privilege is designed to alleviate those who file self-critical reports with the government from the "chilling effect" of knowledge that such reports would be generally disclosed. *See, e.g., Webb v. Westinghouse Electric Corp.*, 81 F.R.D. 431, 433 (E.D. Pa. 1978).

Congress has acted to protect those reports that it deems sufficiently sensitive to warrant confidentiality. Thus Congress has enacted laws prohibiting disclosure of certain information filed in response to federal requirements in a myriad of situations.[2] ANR's invitation to

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[2] The federal government protects by statute a variety of reports filed pursuant to regulation. *See, e.g.*, 35 U.S.C. § 122 (patent applications); 7 U.S.C. § 608 (marketing agreements under Agricultural Adjustment Act); 12 U.S.C. §§ 1091, 1442(a) (certain information collected by banks); 47 U.S.C. § 412 (Federal Communications Commission information disadvantageous to domestic businesses competing with foreign enterprises).

fashion a judicial privilege subsuming and expanding on the reasoned and specific approach of Congress to individual filings is unwarranted.

Additionally, the recognition of a *per se* privilege, rather than a balancing approach, ignores the power of courts to fashion protective orders to ensure against public dissemination of information while protecting the plaintiff's right to prove his or her case. *See, Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) (recognizing district court's use of protective orders in connection with claim of privilege); *O'Connor*, 86 F.R.D. at 218 (imposing protective order prior to disclosure of affirmative action data). In this case, a protective order already prevents disclosure of sensitive material to the public.

The self-critical analysis privilege also affords inadequate weight to the interests of plaintiffs in discovering relevant evidence. In many instances the government-required compilations provide crucial data necessary to establish the elements of the plaintiff's case. *See, e.g., Webb*, 81 F.R.D. at 433 (finding that "[t]o the extent that the defense of 'self-critical analysis' conflicts with a plaintiff's ability to gather information necessary to prove his or her case, the recognition of such a defense (sic) hampers the enforcement of federal equal employment laws"). Self-critical analyses by their very nature, are extremely probative of the issues they discuss. Further, the fact that the information is critical of the reporter's position provides the same indicia of reliability and veracity that support the exception of admissions against interest from the definition of hearsay under Federal Rule of Evidence 801(d)(2). *See*, 4 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶801(d)(2)[01] (1990).

In addition, recognition of such a privilege is based on a false premise: the free flow of information to government regulators cannot be accomplished without a blanket assurance that such information will be privileged from discovery. This assumes that those asked to report to the government will conceal, misrepresent, or obfuscate information unless a privilege is created. There is no reason to ascribe such motives to reporters. The government also has numerous and varied means of ensuring that accurate and complete information is provided by regulated entities. Thus the government has mandated criminal penalties for failure to submit required reports under oath,[3] and civil liability for similar infractions. To assume that, in the absence of a "self-critical analysis" privilege, such information would not be available is to underestimate both the honesty of those who report such information and the coercive power of the government.

(ii) Even were such a privilege to be recognized, it would not apply in this case.

Those district courts that have recognized a self-critical analysis privilege have required a party to establish the following elements to avail itself of the privilege:

> First, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the

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[3] *See, e.g.*, 45 U.S.C. § 39 (dealing with duty to report railroad accidents).

> type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.

Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083, 1086 (1983). ANR has failed to establish that the requested documents meet these criteria.

The FERC's request for data on the various pipelines' outstanding take or pay liability covered pipelines' total take or pay liability under each of their contracts. 52 Fed. Reg. 30334, 30341. The FERC did not instruct pipelines to undertake a self-critical analysis of these liabilities or to evaluate their prior performance under take or pay contracts.

The FERC's request contrasts sharply with the scope and nature of requests that have been previously found to implicate a self-critical analysis privilege. Recognition of the privilege has been confined primarily to the equal employment opportunity context. *Dowling v. American Hawaii Cruises, Inc.*, 133 F.R.D. 150 (D. Hawaii 1990) (recognizing limitation); *O'Connor*, 86 F.R.D. at 214; *Webb*, 81 F.R.D. at 435; *Hoffman v. United Telecommunications, Inc.*, 117 F.R.D. 440 (D. Kan. 1987); *Coates*, 756 F.2d at 551 (acknowledging assertion of privilege but declining review). Courts recognizing the privilege in this context have been quick to point out the peculiar exigencies of filings under equal employment opportunity laws. *See, e.g., O'Connor*, 86 F.R.D. at 216 (focusing on regulations pursuant to executive order that require self-analysis of an employer's deficiencies in the affirmative action plans).

The FERC's request for take or pay data requires no such critical analysis. If, as ANR contends in this action, it has no take or pay liability, it should have reported that it had no liability to the FERC. If ANR reported to the FERC that it had take or pay liability, it should explain the contradiction in its position to the trier of fact in this case. ANR's appraisal of its take or pay liability should not be considered self-critical simply because ANR has taken an inconsistent position in this suit.

ANR also has failed to demonstrate how the free flow of information will be fostered by recognition of the privilege in this case. The FERC's request for data was issued only in support of its promulgation of an order. No supplementation or updates of these reports have been required. Because repeated filings are not required, the issue of ANR's fidelity in subsequent filings is not relevant. Because disclosure of this material can have no chilling effect on future filings where no such filings are required, both the rationale and prerequisite for application of the self-critical analysis privilege are absent.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 90-1401

IN THE

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OCTOBER TERM, 1990

ANR PIPELINE COMPANY,

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v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE JOINT BRIEF *AMICI CURIAE* AND JOINT BRIEF *AMICI CURIAE* OF THE AMERICAN GAS ASSOCIATION AND THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1401

ANR PIPELINE COMPANY,

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v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),

Respondent.

MOTION FOR LEAVE TO FILE JOINT BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of the Supreme Court, the American Gas Association ("A.G.A.") and the Interstate Natural Gas Association of America ("INGAA") respectfully move for leave to file the attached brief as *amici curiae* in support of ANR Pipeline Company's ("ANR") petition for a writ of certiorari. The consent of counsel for ANR has been obtained. Counsel for respondent Exxon Corporation (real party in interest) has not consented.

A.G.A. is a national non-profit trade association representing the interests of its approximately 250 member companies involved in the distribution and transmission of natural gas throughout the United

States and Canada. A.G.A. distribution company members buy or take delivery of natural gas from interstate pipeline companies such as ANR for resale or transportation to approximately 160 million consumers.

INGAA is a non-profit national trade association whose membership includes virtually all of the major interstate natural gas pipeline companies operating in the United States. INGAA's United States members account for over 90 percent of all natural gas transported and sold for resale in interstate commerce.

As national organizations representing virtually all of the interstate pipeline companies and many other companies involved in the distribution of natural gas, A.G.A. and INGAA are especially cognizant of the predictable consequences of the rulings for which ANR seeks review.

The means chosen by the Federal Energy Regulatory Commission (the "Commission") to resolve the take-or-pay crisis that has afflicted the natural gas industry for the past several years is the voluntary settlement of those claims by producers and pipeline companies. The success of the Commission's settlement policy depends upon both the producer and the pipeline company having substantially equal bargaining power. Allowing producers access to the type of information which the lower courts have ordered ANR to produce in this case—confidential settlement agreements entered by ANR with other producers and self-critical analyses which ANR prepared and submitted to the Commission—would undermine pipeline companies' bargaining position, make settlement more difficult, and prolong the take-or-pay problem in the industry.

A.G.A. and INGAA believe that they are distinctly positioned to present the views of the industry.

For these reasons, A.G.A. and INGAA respectfully request that this Court grant this motion so that they may present their views in the attached brief.

Respectfully submitted,

/s/ John H. Cheatham, III

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Respondent.

JOINT BRIEF *AMICI CURIAE* OF THE AMERICAN GAS ASSOCIATION AND THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

The American Gas Association ("A.G.A.") and the Interstate Natural Gas Association of America ("INGAA") submit this joint brief *amici curiae* in support of the petition for a writ of certiorari filed by petitioner ANR Pipeline Company ("ANR").

INTEREST OF THE AMICI CURIAE

A.G.A. is a national non-profit trade association representing the interests of its approximately 250 member companies involved in the distribution and transmission of natural gas throughout the United States and Canada. A.G.A.'s members include inter-

state pipelines, such as ANR, and local natural gas distribution companies. Collectively, these companies serve consumers in all fifty states and account for 85 percent of the nation's natural gas utility sales. A.G.A. distribution company members buy or take delivery of natural gas from interstate pipeline companies such as ANR for resale or transportation to approximately 160 million consumers.

INGAA is a non-profit national trade association whose membership includes virtually all of the major interstate natural gas pipeline companies operating in the United States, as well as major Canadian interprovincial pipelines which are regulated by the National Energy Board of Canada. INGAA's United States members account for over 90 percent of all natural gas transported and sold for resale in interstate commerce.

For many years, both INGAA and A.G.A. have appeared in proceedings before the Federal Energy Regulatory Commission (the "Commission"), United States Courts of Appeals, and the United States Supreme Court when issues affecting the general interests of their members and of the natural gas industry have been involved.

SUMMARY OF THE ARGUMENT

The means chosen by the Commission to resolve the take-or-pay crisis that has afflicted the natural gas industry for the past several years is the voluntary settlement of those claims by producers and pipeline companies. The success of the Commission's settlement policy depends upon both the producer and the pipeline company having substantially equal bargaining power. Allowing producers access to the type

of information which the lower courts have ordered ANR to produce in this case—confidential settlement agreements entered by ANR with other producers and ANR's self-critical analyses which ANR prepared and submitted to the Federal Energy Regulatory Commission—would undermine pipeline companies' bargaining position, make settlement more difficult, and prolong the take-or-pay problem in the industry.

ARGUMENT

A.G.A. and INGAA request that this Court grant ANR's petition for a writ of certiorari. In its petition, ANR requests that the Court review orders of the courts below that would compel ANR to disclose to Exxon Corporation, a major natural gas producer, (i) the terms of confidential agreements to settle disputes under gas supply contracts between ANR and other producers, and (ii) ANR's self-critical analyses of its payment obligations under gas supply contracts with other producers, which ANR was compelled by a Commission order to prepare and file with the Commission. Disclosure to Exxon of these documents would not only damage consumers of natural gas but also frustrate federal regulatory policy.

This Court recently acknowledged that "take-or-pay" contracts have been a major cause of the severe distortions in natural gas markets over the last decade. *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 111 S. Ct. 615, 621, 627 (1991). This Court has also acknowledged the Commission's extensive, ongoing efforts to address the problems caused by take-or-pay contracts. *Id.* at 627-28.

The most significant aspect of those efforts is the Commission's reliance upon the success of the private negotiation and settlement of take-or-pay contract disputes between producers and interstate pipelines. "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500-H, 54 Fed. Reg. 52,344, 52,358 (Dec. 21, 1989) ("Order 500-H"); *see American Gas Ass'n v. FERC*, 912 F.2d 1496, 1508 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991). In fact, the Commission has recognized that the success of its efforts to correct market distortions depends heavily upon the ability of pipeline companies to negotiate settlements on a competitive basis with the producers. Order 500-H, 54 Fed. Reg. at 52,359. Accordingly, the Commission has expressly refused to take action that would disadvantage pipelines in the negotiation process.

Specifically, the Commission considered a request for disclosure of some of the very same information concerning individual producer/pipeline settlements and evaluative data that Exxon seeks to compel in this case. The Commission firmly rejected that request, stating:

> There is no doubt that these data and material submitted by the pipelines are sensitive commercial information. Disclosure will . . . cause the pipelines substantial competitive harm in that producers will know the terms of settlements that have already been executed. In addition, such disclosure will harm pipeline ratepayers and consumers because a lessening of the pipelines' bargaining power would result in less favorable settlements for

> the pipelines and the flowthrough of the attendant higher settlement costs to ratepayers and consumers.

"Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-059], Order Denying Release of Data, 50 FERC (CCH) ¶ 61,391 at 62,219 (Mar. 21, 1990). The United States Court of Appeals for the District of Columbia Circuit upheld the Commission's determination not to release the data. *American Gas Ass'n*, 912 F.2d at 1508 n.3.

The Commission, in an exercise of its expertise, thus refused to disclose some of the very same information and data Exxon seeks in this case.[1] The same reasons dictate that ANR should not be compelled to produce the agreements and information requested by Exxon. Such disclosure would thwart federal regulatory policy that relies on competitively bargained settlements of gas supply contract disputes between producers such as Exxon and pipelines such as ANR. It would be inconsistent with that policy to give producers an unfair bargaining advantage that would result in increased prices to consumers.

In this connection, interstate pipelines' costs of service, including the cost of gas supply, generally are included in the pipelines' rates to their customers under regulations and policies promulgated by the Commission. The Commission has determined that "there

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[1] Although no Commission order is at issue here, AGA and INGAA assert that "a presumption of validity" should be accorded to the "exercise of the Commission's expertise" in an analogous circumstance. *See Mobil Oil Corp. v. FPC*, 417 U.S. 283, 307 (1974).

should be an equitable sharing of take-or-pay costs among all segments of the industry . . . ." "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500, 52 Fed. Reg. 30,334, 30,342 (Aug. 7, 1987); *see also* "Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs," Order No. 528, FERC Docket No. RM91-2-000, 53 FERC (CCH) ¶ 61,163, at 61,596 (Nov. 1, 1990) ("The Commission reiterates its conviction that *all* segments of the industry must share the responsibility for paying for these transition costs."), *rehearing granted in part and denied in part*, Order No. 528-A, 54 FERC (CCH) ¶ 61,095 (Jan. 31, 1991).

To effectuate its policy of "equitable sharing," the Commission has adopted a policy providing for the apportionment of take-or-pay settlement costs between pipelines and their customers. Order No. 500, 52 Fed. Reg. at 30,342. Under this policy, interstate pipeline companies are entitled to pass through in their rates a portion of the cost incurred in settling take-or-pay claims with producers, thus requiring the pipelines' customers and consumers to share in the cost of resolving the take-or-pay crisis.[3]

Allowing producers access to the type of information that Exxon seeks here—confidential information regarding pipelines' take-or-pay settlements and agreements with other producers—gives those pro-

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[3] *See* Foster Natural Gas Report, No. 1811 at 17-21 (Feb. 7, 1991) (showing that, in most states, those take-or-pay charges not absorbed by pipelines flowed through to the ultimate natural gas consumers).

ducers an unfair advantage in their negotiations with the pipelines, to the disadvantage of the pipelines, the pipelines' customers, and consumers of natural gas. Such disclosure thus discriminates in favor of producers, and destroys the Commission's stated policy of enforcing an "equitable sharing" of take-or-pay costs among all segments of the industry.

CONCLUSION

If interstate pipelines are compelled to show producers their settlement agreements with other producers and to reveal their analyses of payment obligations under contracts with other producers, the pipelines will be severely disadvantaged in their negotiation of settlements with producers. The cost of settling contract disputes will therefore increase, causing an increase in the cost of gas to consumers. Requiring such disclosure discriminates in favor of producers and against pipelines and their customers, and frustrates established federal regulatory policy.

For these reasons, A.G.A. and INGAA respectfully request that ANR's petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1990

ANR PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE JOINT BRIEF *AMICI CURIAE* AND JOINT BRIEF *AMICI CURIAE* OF MICHIGAN CONSOLIDATED GAS COMPANY AND MICHIGAN GAS UTILITIES IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1401

ANR PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),

Respondent.

MOTION FOR LEAVE TO FILE JOINT BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of the Supreme Court, Michigan Consolidated Gas Company ("MichCon") and Michigan Gas Utilities ("MGU") respectfully move for leave to file the attached brief as *amici curiae* in support of ANR Pipeline Company's ("ANR") petition for a writ of certiorari. The consent of counsel for ANR has been obtained. Counsel for respondent Exxon Corporation (real party in interest) has not consented.

MichCon, a wholly-owned subsidiary of the MCN Corporation, is a natural gas company engaged in the distribution, transmission, and storage of natural gas, and serves more than one million customers through-

out Michigan. MichCon is a sales and transportation customer of ANR.

MGU, a division of UtiliCorp United Inc., is a natural gas distributor operating entirely within Michigan and is a sales and transportation customer of ANR.

The issues presented by this case—whether a producer of natural gas should, in take-or-pay litigation, be given access to the details of a pipeline's past settlements with other producers and the self-critical evaluations performed by the pipeline and submitted to the Federal Energy Regulatory Commission (the "Commission")—affect important interests of MichCon and MGU, as well as the interests of ultimate consumers of natural gas.

Under rules issued by the Commission to address the problem in the natural gas industry attributable to take-or-pay contracts, interstate pipeline companies are entitled to pass through in their rates a portion of the costs incurred in settling take-or-pay claims with producers. Pipelines' customers, such as MichCon and MGU, as well as ultimate consumers of natural gas, thereby bear a portion of the cost of resolving the take-or-pay crisis. Allowing producers access to pipelines' past settlement agreements will, predictably, increase the costs of settlement. These increased costs will be borne in part by pipelines' customers and ultimate consumers of natural gas. The orders of the courts below will frustrate the Commission's policy for resolving the take-or-pay crisis. Accordingly, MichCon and MGU request that the Court grant ANR's petition for a writ of certiorari, and fully review those orders.

As local distribution companies which purchase gas from interstate pipeline companies, MGU and MichCon

have a stake in the outcome of this petition, and have a perspective on the issues raised by the petition that is not represented by either of the parties in the case. For these reasons, MichCon and MGU respectfully request that this Court grant this motion so that they may present their views in the attached brief.

Respectfully submitted,

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Respondent.

JOINT BRIEF *AMICI CURIAE* OF MICHIGAN CONSOLIDATED GAS COMPANY AND MICHIGAN GAS UTILITIES IN SUPPORT OF PETITIONER

Michigan Consolidated Gas Company ("MichCon") and Michigan Gas Utilities ("MGU") submit this joint brief *amici curiae* in support of the petition for a writ of certiorari filed by petitioner ANR Pipeline Company ("ANR").

INTEREST OF THE AMICI CURIAE

MichCon is a wholly-owned subsidiary of the MCN Corporation, which is an exempt public utility holding company. MichCon is a natural gas company engaged in the distribution, transmission, and storage of natural gas, and serves more than one million customers

throughout Michigan. MichCon is a sales and transportation customer of ANR.

MGU is a division of UtiliCorp United Inc. UtiliCorp United is a combination electric utility and natural gas distribution company supplying electrical power at resale and wholesale in parts of Missouri and West Virginia and distributing natural gas in parts of Iowa, Minnesota, Colorado, Nebraska, Michigan, Missouri, West Virginia, and Kansas. MGU is a natural gas distributor operating entirely within Michigan and is a sales and transportation customer of ANR.

SUMMARY OF THE ARGUMENT

The courts below have ordered ANR, an interstate pipeline company, to disclose to Exxon Corporation ("Exxon"), a natural gas producer, the terms of confidential settlement agreements entered between ANR and other producers in take-or-pay litigation, and self-critical take-or-pay analyses which the pipeline compiled and submitted to the Federal Energy Regulatory Commission (the "Commission") in response to a Commission directive. Requiring production of these documents would lead to higher prices for natural gas for ultimate consumers of natural gas, and would frustrate the Commission's policy for resolving the take-or-pay crisis.

Under rules issued by the Commission to address the problem in the natural gas industry attributable to take-or-pay contracts, interstate pipeline companies are entitled to pass through in their rates a portion of the costs incurred in settling take-or-pay claims with producers. Pipelines' customers, such as MichCon and MGU, as well as ultimate consumers, thereby bear a portion of the cost of resolving the take-or-

pay crisis. Allowing producers access to pipelines' past settlement agreements will, predictably, increase the costs of settlement. These increased costs will be borne in part by pipelines' customers and ultimate consumers of natural gas. MichCon and MGU request that the Court grant ANR's petition for a writ of certiorari, and fully review those orders.

ARGUMENT

The Commission, in addressing the "significant dislocations" in the gas market caused by take-or-pay contracts, *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 111 S. Ct. 615, 627 (1991), has determined that "there should be an equitable sharing of take-or-pay costs among all segments of the industry, including producers, pipelines, distributors and consumers." "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500, 52 Fed. Reg. 30,334, 30,342 (Aug. 7, 1987).[1] To facilitate this approach the Commission has adopted a policy providing for the apportionment of take-or-pay settlement costs between pipelines and their customers. Order No. 500, 52 Fed. Reg. at 30,342. Under this policy, interstate pipeline companies are entitled to pass through in their rates a portion of the costs incurred in settling take-or-pay claims with producers. Pipelines' customers and ultimate consumers of natural gas thereby bear a portion of the cost of resolving the take-or-pay crisis.

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[1] This Court has recognized the Commission's extensive, ongoing efforts to address the problems caused by take-or-pay contracts. *See Mobil Oil Exploration*, 111 S. Ct. at 627-28.

The Commission has recognized that the success of its effort depends heavily upon the ability of pipeline companies to negotiate settlements on a competitive basis with producers. "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500-H, 54 Fed. Reg. 52,344, 52,359 (Dec. 21, 1989) ("Order 500-H"); *see American Gas Ass'n v. FERC*, 912 F.2d 1496, 1508 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991). Allowing producers access to the details of past settlements entered into by a pipeline will give producers an unfair advantage in their negotiations with the pipelines. The costs of settlements will, predictably, increase. Because pipelines can pass through a significant portion of the cost of these higher settlements to resale customers, the impact of unfairly allowing producers access to this information will be borne in part by pipelines' customers, such as MichCon and MGU, and ultimate consumers of natural gas.

The Commission, which is entrusted with the regulation of the natural gas industry, has expressly rejected a request for disclosure of some of the same information at issue in this case, recognizing:

> There is no doubt that these data and material submitted by the pipelines are sensitive commercial information. Disclosure will . . . cause the pipelines substantial competitive harm in that producers will know the terms of settlements that have already been executed. In addition, such disclosure will harm pipeline ratepayers and consumers because a lessening of the pipelines' bargaining power would result in less favorable settlements for

> the pipelines and the flowthrough of the attendant higher settlement costs to ratepayers and consumers.

"Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-059], Order Denying Release of Data, 50 FERC (CCH) ¶ 61,391, at 62,219 (Mar. 21, 1990).

The rulings by the courts below allowing a producer access to confidential settlement information, if allowed to stand as precedent, will jeopardize the "equitable sharing" of take-or-pay costs envisioned by the Commission. The Commission's efforts to protect gas consumers from excessive gas costs would have the distorted impact of weakening the bargaining position of pipelines, leading to higher gas costs, and discriminating in favor of producers to the detriment of pipelines, local distribution companies, and their customers, the ultimate consumers of natural gas. This Court should review the orders of the courts below to ensure that federal policy on this important issue is not frustrated.

CONCLUSION

For these reasons, MichCon and MGU respectfully request that ANR's petition for a writ of certiorari be granted.

Respectfully submitted,

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